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## APPENDIX

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY,

*Appellant,*

—v.—

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT FILED AUGUST 16, 1967  
PROBABLE JURISDICTION NOTED NOVEMBER 6, 1967

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY,

*Appellant,*

—v.—

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES,

*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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**STATE OF LOUISIANA**  
**PARISH OF ORLEANS**  
**CITY OF NEW ORLEANS**  
**CIVIL DISTRICT COURT**  
**FOR THE PARISH OF ORLEANS**

---

No. 430-566              Division "G"              Docket No. 4

THELMA LEVY, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: RONALD BELL, REGINA LEVY, CECILA LEVY, LINDA LEVY and AUSTIN LEVY,

vs.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A. B. C. INSURANCE COMPANIES.

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**Chronological List of Docket Entries**

**1964**

- December    16. Petition, Affidavit & Order (1)  
              16. (3) Copies Petition Citation  
              16. Library fees  
              16. Venire  
              16. Stenographer fees  
              23. Return on Citation 12-21-64

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1965

- January      4. Motion for extension of time (2)  
              5. Return on Citation 12-31-64  
              11. Motion State of Louisiana for extension  
              of time to plead (3)  
              22. Motion of Dr. Willard Jones Wing M.D.  
              for an extension of time (4)  
              22. Photostats
- February     10. Exceptions of State of Louisiana at  
              10:25 a.m. (5)
- March        9. Exceptions of Board of Administrators  
              Charity Hospital at Louisiana at New  
              Orleans @ 10:45 a.m. (6)
- April        23. Peremptory & Dilatory Exceptions and  
              Memorandum of Dr. W. J. Wing M.D.  
              and Interstate Fire and Casualty Com-  
              pany @ 10:23 a.m. (7)
- September    23. Motion to fix Exceptions & Copies (8)  
              30. Return on Motion 9-27-65
- October      13. Supplemental and Amending Petition  
              and Order (9)  
              14. Motion to be made attorney of record  
              (10)
- November     9. Exceptions of Dr. W. J. Wing and Inter-  
              state Fire and Casualty Company (11)  
              12. Peremptory Exceptions @ 1:25 P.M.  
              (12)

1965

November 24. Exceptions of the State of Louisiana  
@ 1:20 P.M. (13)

December 1. Motion to fix Exceptions & Copies (14)  
6. Return on (1) Motion 12-1-65  
7. Return on (2) Motions 12-3-65  
7. Continued to 12-21-65

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1966

January 28. Third Supplemental and Amending Petition and Order (1) Exhibit attached (15)  
28. Exceptions maintained  
31. Judgment on Exceptions Read, Rendered and Signed (16)  
31. Notice of Judgment (17)  
31. Second Supplemental and Amending Petition (18)  
April 21. Petition for Appeal (19)  
21. (3) Notices of Appeal (20)  
August 10. Testimony and C.

**Minutes of Court**

**EXTRACTS FROM THE MINUTES OF DIVISION "G",  
HONORABLE PAUL P. GAROFALO, Judge.**

Continued Indefinitely

Friday October 15, 1965

The following Rule was Continued Indefinitely.

—  
**THELMA LEVY, ETC., ET AL.,**

—vs.—

**THE STATE OF LOUISIANA, ETC., ET AL.**

**No. 430-566**

Continued to 12-21-65

Tuesday December 7, 1965

Continued

December 17, 1965

The following Rule was Continued to January 14, 1966

—  
**THELMA LEVY, ETC., ET AL.,**

—vs.—

**THE STATE OF LOUISIANA, ETC., ET AL.**

**No. 430-566**

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA

Petition for Damages Due to Malpractice

(Filed December 16, 1964)

*To the Honorable of the Civil District Court for the Parish of Orleans, State of Louisiana:*

The petition of Thelma Levy, in the capacities represented above and on behalf of the minors Ronald Bell, Regina Levy, Cecilia Levy, Linda Levy and Austin Levy, all of whom are domiciled in the Parish of Orleans, State of Louisiana, with respect represents that:

I.

The State of Louisiana through the Board of Administrators of Charity Hospital of Louisiana at New Orleans owns operates and is responsible for the operation of the Charity Hospital at New Orleans.

II.

On the dates and at the place in question W. J. Wing, M. D. was an employee of and a resident medical doctor at Charity Hospital of Louisiana in New Orleans and was acting within his scope of employment when the events in question took place.

III.

Defendants, designated as A. B. C. Insurance Companies are unknown to the petitioner at this time are the liability insurers for medical malpractice of the Charity

Hospital of Louisiana at New Orleans and its employee medical doctors and/or W. J. Wing, a medical doctor

—6—

who was a resident at Charity Hospital of Louisiana in New Orleans in March of 1964.

#### IV.

Petitioner, Thelma Levy, is the sister of one Louise Levy and the Administratrix of the Succession of Louise Levy said Succession being on file in the Civil District Court of the Parish of Orleans, State of Louisiana and is the tutrix of the minor children of Louise Levy the said children being:

RONALD BELL, CECILIA LEVY, REGINA LEVY, LINDA LEVY and AUSTIN LEVY.

#### V.

Defendant, W. J. Wing's, address is not known to your petitioner but in the event that service is not obtained upon him it is hereby requested that a curator ad hoc be appointed to represent the said absent defendant, W. J. Wing, M. D. in these proceedings and an order so stating will be submitted to this honorable court at a later date.

#### VI.

Thus, Defendants, The State of Louisiana through The Board of Directors of Charity Hospital at New Orleans, W. J. Wing, M. D. and A. B. C. Insurance Companies, are individually, jointly and in solido liable to your petitioners for the full and true sum Sixty Thousand Dollars and No Cents (\$60,000.00), with legal interest from judicial demand and all costs of these proceedings for reasons which follow, to-wit:

## VII.

On or about the March 12, 1964 one Louise Levy came to Charity Hospital in New Orleans, Louisiana with the following symptomatology: tiredness, dizziness, weakness, chest pain, and slowness of breath.

## VIII.

At this time and place her case was assigned to one W. J. Wing, M. D. who was on the time and at the dates in question a resident of Charity Hospital of Louisiana at New Orleans and who saw the above patient in his scope of authority as a resident physician of the said hospital.

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## IX.

At this time and place Dr. W. J. Wing saw Louise Levy in a professional capacity as a resident of the said hospital and purportedly examined her regarding the above complaints but the said medical doctor did then and there fail to make any type of adequate physical examination of the said patient. In particular he failed to take her blood pressure or to make a proper check of her eyes or any other test such as urinalysis which would have revealed her true serious condition in time that the terminal crisis that did occur might have been avoided.

## X.

On March 12, W. J. Wing, M.D., a defendant herein, after making the above described superficial test and ordering an inadequate x-ray examination sent the patient home in a critical condition to fill herself with tonic and tranquilizers, namely Sodium Butisol and Alertonic.

**XI.**

On March 19, 1964, the said Louise Levy was returned to Charity Hospital of Louisiana at New Orleans, a defendant herein, by her family and at this time her symptoms were more severe and she was again referred to W. J. Wing, M.D. who merely looked at the patient in question without making any examination of her condition and told her in substance: "1. She was not taking the medicine given her 2. Made her an appointment with psychiatry on May 14, 1964."

**XII.**

After these two obviously inadequate examinations Louise Levy had a terminal episode, which proper medication might have prevented, and was brought to the hospital comatose on March 22, 1964.

**XIII.**

Only then, on March 22nd, when the patient in question was comatose was an adequate examination and subsequent treatment carried out. The correct diagnosis of her condition was hypertension Uremia from which cause the said

—8—

Louise Levy died on March 29, 1964.

**XIV.**

When Louise Levy was seen on the 12th and 19th of March at Charity Hospital of Louisiana at New Orleans by W. J. Wing, M.D. there was some chance that with proper medication her life may have been at least prolonged. But as a direct and proximate result of the malpractice and wanton negligence of W. J. Wing, M.D., who

was acting at the time within the scope of his capacity as a resident medical doctor for Charity Hospital of Louisiana in New Orleans, Louise Levy was robbed of this "valuable chance".

#### XV.

The above described failure to make a proper examination was gross negligence on the part of W. J. Wing, M.D. and through his agency gross negligence on the part of Charity Hospital of Louisiana at New Orleans which said negligence directly contributed to and concurrently caused the actionable death of Louise Levy.

#### XVI.

As a direct result of the above described negligence Louise Levy, her estate, and her minor children suffered the following damages:

Louise Levy, (mental anguish while alive) .... \$ 5,000

(All children for loss of mother prior to age 21 yrs.)

1. Ronald Bell .....	3,000
2. Regina Levy .....	9,000
3. Cecilia Levy .....	11,000
4. Linda Levy .....	13,000
5. Austin Levy .....	14,000
(\$1,000 for each child for loss after 21 yrs.) ..	5,000

(N.B. all claims include the loss of chance for life)

TOTAL .....	\$60,000
-------------	----------

XVII.

Petitioners herein at this time specifically plead to R.S. 46:759 and the application of the doctrine of res ipsa loquitur and further avers that agents of the hospital have made certain admissions against interest which support the petitioners allegations.

XVIII.

That the administratrix, children and estate of Louise

—9—

Levy are without means and are unable to pay, in advance or as they accrue, the cost of prosecuting this cause of action, or to post bond therefor, and being residents of the State of Louisiana request permission to file this action in forma pauperis.

XIX.

Petitioners, further plead that while Louise Levy's condition was chronic she had no knowledge of it and did all in her power to seek medical aid after she was twice turned away from Charity Hospital of Louisiana in New Orleans, and more specifically they plead a lack of any negligence on the part of the petitioners herein or Louise Levy.

XX.

Amicable demand has been made to no avail, petitioner also request the trial of these matters by jury.

WHEREFORE, petitioner, Thelma Levy, in her capacity of administratrix of the estate of Louise Levy and tutrix of her minor children, and on behalf of; Ronald Bell, Regina Levy, Cecila Levy, Linda Levy and Austin Levy, prays

for judgment against the defendants, the State of Louisiana, W. J. Wing, M.D., and ABC Insurance Companies, after due proceedings had, for the full and true sum of sixty thousand dollars and no cents (\$60,000.00) with legal interest from judicial demand, for all cost of these proceedings, and for all general and equitable relief.

LAWRENCE J. SMITH  
*Attorney for Petitioner*  
404 Richards Building  
New Orleans, Louisiana  
525-0695

ORDER

Considering the foregoing petition and attached affidavits, let this petition and matter be filed in forma pauperis and the petitioner is hereby dispensed from the necessity of paying for the cost of prosecuting this cause of action and let the matters herein be set for trial by jury.

December 16, 1964

CLARENCE DOWLING

—10—

STATE OF LOUISIANA  
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared, Thelma Levy, who after being duly sworn deposed and said:

That she is the petitioner herein, she is a citizen of the State of Louisiana and is presently residing and domiciled therein; that she, in her capacity as tutrix of the minor children of or as administratrix of the estate of Louise

Levy, because of the poverty or lack of means of herself, the minor children of Louise Levy, and the estate of Louise Levy, she is unable to make prior payment of the cost of these proceedings, or to pay them as they accrue, or to post bond therefor.

THELMA LEVY  
*Petitioner*

Sworn to and subscribed before me this 15 day of December 1964.

(Signature illegible)  
*Notary Public*

BEFORE ME, the undersigned authority, personally came and appeared Mary Levy, who after being duly sworn deposed and said:

That she knows Thelma Levy, the children of Louise Levy, and knows the financial condition of the estate of Louise Levy, all plaintiffs in the foregoing petition, and she believes and therefore avers that the above named persons and entities are unable to pay the cost of these proceedings either in advance or as they accrue, or to give bond therefor.

MARY LEVY  
*Affiant*

Sworn to and subscribed before me this 15 day of December 1964.

(Signature illegible)  
*Notary Public*

—10A—

**Citation****CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

To: W. J. Wing, M.D.,  
Charity Hospital,  
New Orleans, Louisiana

You ARE HEREBY CITED to either comply with the demand contained in the petition of which certified copy accompanies this citation, or, make an appearance, either by filing a pleading or otherwise, in The Civil District Court for the Parish of Orleans, State of Louisiana, the address of which is The Civil Courts Building, 421 Loyola Avenue, New Orleans, Louisiana, within fifteen days after the service hereof under penalty of default.

Witness the Honorables Rene A. Viosca, Alexander E. Rainold, Oliver P. Carriere, Clarence Dowling, Fred J. Cassibry, Howard J. Taylor, David Gertler and Paul P. Garofalo, Judges of the said Court.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of The Civil District Court for the Parish

of Orleans, State of Louisiana, this 17th day of Dec.  
in the year of our Lord 1964.

THOMAS S. BUCKLEY  
*Clerk of The Civil District Court  
for the Parish of Orleans,  
State of Louisiana*

by /s/ (Signature illegible)  
*Deputy Clerk.*

Clerk's Office, Room 402, Civil Courts Building  
421 Loyola Avenue, New Orleans, Louisiana

CERTIFICATE OF SERVICE (omitted in printing)

—11—

**Motion and Order of Ingard O. Johannesen**

(Filed January 4, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

On motion of Ingard O. Johannesen, Attorney for the Charity Hospital of Louisiana at New Orleans Board of Administrators, and on suggesting to this Honorable Court that this matter has just been turned over to mover, and mover desires time in which to investigate the same, it is therefore respectfully requested that mover be granted an extension of thirty (30) days time in which to properly file his pleadings or answer in this matter.

IT IS ORDERED that mover herein be granted an extension of thirty (30) days in which to file pleadings or answer this matter.

New Orleans, Louisiana, December 4th, 1965.

CLARENCE DOWLING

*Judge*

Respectfully submitted,

INGARD O. JOHANNESSEN  
*Attorney for Charity Hospital  
of Louisiana at New Orleans  
Board of Administrators*

**Motion and Order of Dorothy D. Wolbrette**

(Filed January 11, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

On motion of Dorothy D. Wolbrette, Assistant Attorney General, representing the State of Louisiana, and on suggesting to this Honorable Court that this matter has just been turned over to mover, and mover desires time in which to investigate the same, it is therefore respectfully requested that mover be granted an extension of thirty (30) days time in which to properly file her pleadings or answer in this matter.

It Is ORDERED that mover herein be granted an extension of thirty (30) days in which to file pleadings or answer this matter.

New Orleans, Louisiana, January 11, 1965.

A. E. RAINOLD  
*Judge*

Respectfully submitted,

DOROTHY D. WOLBRETTE  
Assistant Attorney General,  
State of Louisiana

—13—

**Motion for Extension of Time Within Which to  
File Responsive Pleadings**

(Filed January 22, 1965)

CIVIL DISTRICT COURT IN AND FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA

Now into Court, through undersigned counsel, comes Dr. Willard Jones Wing, M.D., defendant in the above entitled and captioned case, who respectfully moves the Court for an extension of time within which to file responsive pleadings.

Mover represents that the issues involved in this litigation are complex and, as yet, unexplored by mover and his Attorneys, and that additional time is required within which to safely plead to the petition filed herein. Mover desires an extension of thirty (30) days from the date of the signing of this Order within which to file responsive pleadings.

PORTEOUS & JOHNSON  
WILLIAM A. PORTEOUS, III  
925 Hibernia Bank Building  
New Orleans, Louisiana, 70112  
Telephone 523-2683  
*Attorneys for Mover*

**ORDER**

IT IS HEREBY ORDERED that defendant, Willard Jones Wing, M.D. be and he is hereby granted thirty (30) days from the date of this Order, or until February , 1965, within which to file responsive pleadings herein.

THIS DONE and SIGNED this 22 day of January, 1965, at New Orleans, Louisiana.

PAUL P. GAROFALO

*Judge*

—14—

CERTIFICATE OF SERVICE (omitted in printing)

**Exceptions**

(Filed February 10, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

Now into court, through undersigned counsel, comes the defendant, State of Louisiana, appearing herein solely for the purpose of this exception, and excepts to the plaintiff's petition on the following grounds.

1. The action herein is a tort suit, from which the State of Louisiana is immune, there being no legislative authority for filing the action herein against the State of Louisiana.
2. The plaintiff lacks procedural capacity to sue inasmuch as she is not the duly appointed administratrix of the succession of Louise Levy or the duly appointed tutrix of the minor children named in her petition.
3. The State of Louisiana was not properly served, service having been made on the Secretary of State, as will appear from the record herein.
4. Suits against the State of Louisiana may not be tried by Jury.

WHEREFORE, exceptor prays that this exception be maintained and that, accordingly, there be judgment herein in favor of defendant and against plaintiff, rejecting the plaintiff's demand at his cost.

JACK P. F. GREMILLION  
*Attorney General*  
*State of Louisiana*

JOHN E. JACKSON, JR.  
*Asst. Attorney General*

DOROTHY D. WOLBRETTE  
*Asst. Attorney General*

CERTIFICATE OF SERVICE (omitted in printing)

**Exceptions**

(Filed March 9, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

Now into Court, through undersigned counsel, comes the defendant, the Board of Administrators, Charity Hospital of Louisiana at New Orleans, appearing herein solely for the purpose of this exception, and excepts to the plaintiff's petition on the following grounds:

**1.**

The action herein is a tort suit, from which the State of Louisiana and agencies thereof are immune, there being no legislative authority for filing the action herein against the State of Louisiana or its agency the Charity Hospital of Louisiana at New Orleans through its Board of Administrators.

**2.**

The plaintiff lacks procedural capacity to sue inasmuch as she is not the duly appointed administratrix of the succession of Louise Levy or the duly appointed tutrix of the minor children named in her petition.

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**3.**

The plaintiff lacks procedural capacity to sue inasmuch as there has been no mention of the death of the natural tutor, the father of the said children.

## 4.

The Board of Administrators of Charity Hospital of Louisiana at New Orleans were not properly sued, nor served, since the suit is only filed against the Charity Hospital at New Orleans.

## 5.

Suits against the State of Louisiana or agencies of the State of Louisiana may not be tried by Jury.

## 6.

Plaintiff does not allege a cause of action against the Board of Administrators of Charity Hospital of Louisiana at New Orleans.

## 7.

The plaintiff does not Pray for judgment against the Board of Administrators of Charity Hospital of Louisiana at New Orleans.

WHEREFORE, exceptor prays that this exception be maintained and that, accordingly, there be judgment herein in favor of defendant and against plaintiff, rejecting the plaintiff's demand at her cost.

INGARD O. JOHANNESSEN  
*Attorney for Defendant,*  
*Board of Administrators of*  
*Charity Hospital of Louisiana*  
*at New Orleans*

**Peremptory and Dilatory Exceptions**

(Filed April 23, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

Now into Court, through undersigned counsel, comes Dr. W. J. Wing, M.D., and Interstate Fire and Casualty Company, improperly designated A. B. C. Insurance Companies in the petition, who with respect except to the petition of the plaintiff and move that said petition be dismissed on the following dilatory and peremptory grounds:

**1.**

The petition discloses no capacity on the part of petitioner to institute the captioned action.

- a) Petitioner has not qualified as the Administratrix of the Succession of Louise Levy.
- b) Petitioner has not qualified as the Tutrix of the unemancipated minors named in the petition and has not negatived the existence of the natural tutor of the said minors.

**2.**

Petitioner, as Administratrix of the Succession of Louise Levy, has no cause or right of action for the wrongful death of Louise Levy, because the law does not confer upon the Administratrix of a Succession a right or cause of action for wrongful death.

## 3.

Petitioner, as Tutrix of the alleged minors, has no right or cause of action for the wrongful death of Louise Levy, because petitioner has not alleged the legitimacy of said minors, and, further, said minors are not in fact legitimate, and to such illegitimate and their tutors, the law allows no right or cause of action for wrongful death.

WHEREFORE, Exceptors pray that these Exceptions be sustained after due proceedings had and that the petition herein be dismissed to petitioner's prejudice and at her costs, and for all general and equitable relief.

WILLIAM A. PORTEOUS, III  
PORTEOUS & JOHNSON  
925 Hibernia Bank Building  
New Orleans, Louisiana 70112  
Telephone—523-2683;

*Attorneys for Dr. W. J. Wing, M.D.  
and Interstate Fire and Casualty  
Company.*

CERTIFICATE OF SERVICE (omitted in printing)

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Folios 22 to 35 (omitted in printing)

—35B—

**Order Fixing Date for Trial**

(Filed September 23, 1965)

STATE OF LOUISIANA

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

On Motion of Mr. William A. Porteous, III, Attorney  
for Defendants; it is ordered that the Exceptions in this  
case be fixed for trial on Friday the 15th day of Oct. 1965.

PAUL P. GAROFALO  
*Judge*

September 23rd, 1965.

[Stamp—A True Copy (signature illegible), Deputy Clerk,  
Civil District Court, Parish of Orleans, State of La.]

**Supplemental and Amending Petition**

(Filed October 13, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS****STATE OF LOUISIANA**

Now into court comes Thelma Levy, petitioner, in the above numbered and entitled cause, and respectfully represents to this honorable court that she desires to supplement and amend her original petition filed herein, in the following respects:

**1.**

By adding the following paragraphs:

**XXI**

Petitioner further alleges that if this honorable court finds that Article 2315 of Louisiana Civil Code does not give unto the children of Louise Levy a right or cause of action for her wrongful death because it is limited only to legitimate children, then petitioner alleges that as to decedent's illegitimate children, the interpretation of said Article 2315 of the Civil Code of the State of Louisiana

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is unconstitutional because it is in violation of the Constitution of the State of Louisiana and of the Fourteenth Amendment to the United States Constitution as it abridges their privileges and immunities as citizens of The United States, it deprives them of life, liberty or property without the due process of law, and it denies to them the equal protection of the laws.

**XXII**

Mary Levy, the mother of decedent, who was her legitimate child, is of the full age of majority and is a resident of the Parish of Orleans, State of Louisiana, and desires to be added as a party plaintiff in the above entitled and numbered proceedings.

**XXIII**

The same actions which caused damage to the children of her daughter caused damage to her.

**XXIV**

Petitioner, Mary Levy, estimates her damages at the sum of \$50,000.00.

**XXV**

The allegation of damages in paragraph XVI includes not only damages for wrongful death but damages suffered directly by the said children because of loss of support and loss of love and affection.

**XXVI**

Petitioner desires to name an additional defendant herein, Interstate Fire and Casualty Company, the insurer of W. D. Wing, Jr., and to substitute said company in lieu of the A. B. C. Insurance Companies.

## 2.

By amending the prayer of the original petition to read as follows:

WHEREFORE, petitioner, Thelma Levy, in her capacity of administratrix of the estate of Louise Levy and tutrix of her minor children, and on behalf of Ronald Bell, Regina Levy, Cecila Levy, Linda Levy and Austin Levy, prays for judgment against the defendants, the Charity Hospital of Louisiana at New Orleans, W. J. Wing, M.D., and Interstate Fire and Casualty Company, jointly and in solido after due proceedings had, for the full and true sum of sixty thousand dollars and no cents (\$60,000.00) with legal interest from judicial demand, for all costs of these proceedings and for all general and equitable relief; and petitioner Mary Levy, further prays for judgment against the defendants, Charity Hospital of Louisiana at New Orleans, W. J. Wing, M.D., and Interstate Fire and Casualty Company, jointly and in solido after due proceedings had, for the full and true sum of fifty thousand dollars (\$50,000.00) with legal interest thereon from judicial demand for all costs of these proceedings, and for all general and equitable relief.

WHEREFORE, petitioners, reiterating the prayer in her original petition, as amended, prays that the original petition be amended and supplemented in the above particulars and that after due proceedings had, there be judgment herein in favor of the petitioner, and against the defendants, all as prayed for herein, and for all general and equitable relief.

LAWRENCE J. SMITH

*Attorney for Petitioner*

1407 Pere Marquette Building

New Orleans, Louisiana

524-6165

**ORDER**

Let the foregoing supplemental and amending petition  
be filed as prayed for.

New Orleans, Louisiana, October 13, 1965.

**PAUL P. GAROFALO**  
*Judge*

CERTIFICATE OF SERVICE (omitted in printing)

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**Motion to Be Made Attorney of Record**

(Filed October 14, 1965).

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

Now into court comes Thelma Levy, petitioner herein, and informs this Honorable Court that additional counsel has been associated for the petitioners in this action and she desires to have the said new counsel Adolph J. Levy also be made attorney of record in this matter.

LAWRENCE J. SMITH

1407 Pere Marquette Building

New Orleans, Louisiana

524-6165

ADOLPH J. LEVY

1407 Pere Marquette Building

New Orleans, Louisiana

524-6165

[Stamp—Entered Minutes G]

## O R D E R .

Considering the foregoing petition, Let and It Is Hereby So Ordered, That Adolph J. Levy, Esq. be made additional attorney of record for petitioners in the above numbered and entitled cause of action.

New Orleans, Louisiana, October 13, 1965.

PAUL P. GAROFALO

Judge

CERTIFICATE OF SERVICE (omitted in printing)

**Peremptory Exceptions**

(Filed November 9, 1965)

CIVIL DISTRICT COURT IN AND FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

Now into Court, through undersigned counsel, come Dr. W. J. Wing, M.D., and Interstate Fire and Casualty Company, for the purpose of excepting to the Supplemental and Amending Petition filed herein. Exceptors with respect represent:

**1.**

By Supplemental and Amending Petition, petitioners have sought to join Mary Levy as a party plaintiff in the above entitled and captioned cause.

**2.**

Defendants have previously filed Peremptory and Dilatory Exceptions in connection with the captioned matter. If the peremptory character of these original Exceptions be sustained, then the original petitioners herein have failed to assert a right or cause of action within the one year provided by Article 2315 of the Civil Code of the State of Louisiana.

**3.**

By Supplemental and Amending Petition, petitioners now claim that Mary Levy is a party vested with a cause of action herein under Article 2315.

## 4.

Exceptors aver that the attempt to assert a cause of action on behalf of Mary Levy comes too late, as such cause of action has prescribed by the limitations period of one year, as provided for in Article 2315 of the Civil Code of the State of Louisiana. Thus, the assertion of a cause of action on behalf of Mary Levy comes too late and should be dismissed.

WHEREFORE, Exceptors pray that the Supplemental and Amending Petition, insofar as same asserts a cause of action on behalf of Mary Levy, be dismissed peremptorily, and for all general and equitable relief.

WILLIAM A. PORTEOUS, III.  
PORTEOUS & JOHNSON  
925 Hibernia Bank Building  
New Orleans, Louisiana 70112  
Telephone—523-2683;

*Attorneys for Dr. W. J. Wing, M.D.  
and Interstate Fire and Casualty  
Company.*

CERTIFICATE OF SERVICE (omitted in printing)

**Peremptory Exceptions**

(Filed November 12, 1965)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS****STATE OF LOUISIANA**

Now into Court, through undersigned counsel, comes the Board of Administrators of Charity Hospital of Louisiana at New Orleans, for the purpose of excepting to the supplemental and amended petition filed herein. Exceptor with respect represents:

**1.**

By supplemental and amended petition, petitioners have sought to join Mary Levy as a party plaintiff in the above entitled and captioned cause.

**2.**

Defendant has previously filed peremptory and dilatory exceptions in connection with the captioned matter. If the peremptory character of these original exceptions be sustained, then the original petitioners herein have failed to assert a right or cause of action within the one year pro-

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vided by Article 2315 of the Civil Code of the State of Louisiana.

**3.**

By supplemental and amended petition, petitioners now claim that Mary Levy is a party vested with a cause of action herein under Article 2315.

## 4.

Exceptor avers that the attempt to assert a cause of action on behalf of Mary Levy comes too late, as such cause of action has prescribed by the limitations period of one year, as provided for in Article 2315 of the Civil Code of the State of Louisiana. Thus, the assertion of a cause of action on behalf of Mary Levy comes too late and should be dismissed.

WHEREFORE, exceptor prays that the supplemental and amended petition, insofar as it asserts a cause of action on behalf of Mary Levy, be dismissed peremptorily, and for all general and equitable relief.

INGARD O. JOHANNESEN

*Attorney for the Board of Administrators  
of Charity Hospital of Louisiana at New  
Orleans*

547 National Bank of Commerce Bldg.  
New Orleans, Louisiana 70112

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CERTIFICATE OF SERVICE (omitted in printing)

—47—

### Exceptions

(Filed November 12, 1965)

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA

Now into Court, through undersigned counsel, comes the defendant, State of Louisiana, appearing herein solely for the purpose of these exceptions, and with full reservation of all of its rights under the exceptions originally filed herein, excepts to the plaintiff's original and amended petition on the following grounds:

1. The State of Louisiana has never been cited herein or served with either the original or the supplemental and amending petition filed herein, the Attorney General never having been cited or served as required in R. S. 13:5106 and Code of Civil Procedure, Articles 1314 and 1880.
2. The original and the supplemental and amending petition filed herein fail to state any cause or right of action for wrongful death under Article 2315 of the Revised Civil Code because:
  - (a) Thelma Levy in the capacity of administratrix, of Louise Levy has no cause or right of action for wrongful death under said Article 2315.
  - (b) Thelma Levy in the capacity of tutrix of the minors named in the petition has no cause or right of action for wrongful death under said Article 2315 because there is no allegation that

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said minors are the legitimate offspring of Louise Levy, as required by Article 2315; and in the event that said minors are not the legitimate offspring of Louise Levy, no right or cause of action exists in their favor under Article 2315. *Board of Commissioners v. City of New Orleans*, 223 La. 199, 65 So. 2d 313; *Jackson v. Lindlom*, 84 So. 2d 101.

3. The supplemental and amending petition fails to state any cause or right of action against the State of Louisiana and has in effect dismissed the State of Louisiana from this suit as a party defendant because the plaintiff does not pray for a judgment against the State of Louisiana.
4. Exceptor pleads the peremption and/or prescription of one year as provided by Article 2315 of the Revised Civil Code by reason of Mary Levy's failure to institute a claim within one year of Louise Levy's death. *Romero v. Sims*, 68 So. 2d 154; *Maher v. Schlosser*, 144 So. 2d 706; Note, 24 Tulane Law Review 373.

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Wherefore, exceptor prays that these exceptions be maintained and that there be judgment herein dismissing the suit of all plaintiffs at their cost.

JACK P. F. GREMILLION  
*Attorney General*

JOHN E. JACKSON, JR.  
*Assistant Attorney General*

(MRS.) DOROTHY D. WOLBRETTE  
*Assistant Attorney General*

CERTIFICATE OF SERVICE (omitted in printing)

~~49B~~**Order Fixing Date for Trial**

(Filed December 1, 1965)

STATE OF LOUISIANA

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

On Motion of William A. Porteous, III Attorney for  
W. J. Wing, M. D., & Interstate Fire & Casualty Co.; it is  
ordered that the Exceptions in this case be fixed for trial on  
Friday the 17 day of December 1965.

Dec. 1st, 1965

PAUL P. GAROFOLO  
*Judge*

[Stamp—A True Copy (initials illegible), Deputy Clerk,  
Civil District Court, Parish of Orleans, State of La.]

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**Third Supplemental and Amending Petition**

(Filed January 28, 1966)

[Stamp—In Forma Pauperis]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 430-566

Division "G"

Docket 4

THELMA LEVY, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY,

vs.

THE STATE OF LOUISIANA, et al.

Filed: Jan. 28, 1966.

A. TALLEY  
*Deputy Clerk*

Now into court comes Thelma Levy, petitioner in the above numbered and entitled cause, and respectfully represents that she desires to supplement and amend her original and supplemental and amending petition in the following respect:

By adding additional paragraphs following paragraphs XXVI to be numbered XXVII through XL:

XXVII.

Decedent was the Negro mother of Ronald Bell, Regina Levy, Cecilia Levy, Linda Levy, and Austin Levy, who through their representative are bringing this action.

XXVIII.

All five children were born out of wedlock.

XXIX.

Decedent certified on each of their birth certificates that she was their mother.

XXX.

Decedent treated all five children in the same manner as any good mother would treat her own legitimate children.

XXXI.

Decedent either took her children or had them taken to Catholic Mass every Sunday.

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XXXII.

She had each of them enrolled in Catholic parochial schools and was paying tuition for them even though she could have sent them to public schools without expense to her.

XXXIII.

She stayed home every night in order to care for her children.

**XXXIV.**

She loved her children dearly and they loved her.

**XXXV.**

She worked as a domestic servant in order to provide income sufficient to clothe, feed and educate the children.

**XXXVI.**

She did everything which a mother of legitimate children would do for her own children, and, indeed, decedent even did more for her children than many legitimate mothers would do for their's.

**XXXVII.**

Decedent's mother would have been willing to relinquish in favor of her grandchildren at any time any rights of succession or of survivorship or any other rights which she had or might have had superior to them.

**XXXVIII.**

Had decedent's mother been asked, she would have consented to decedent's legitimization of decedent's children, even knowing that this would have caused her to lose all rights of succession and all rights under Louisiana Civil Code Article 2315 in case of the death of her daughter.

**XXXIX.**

The income and care which decedent was providing for her children now must be and can only be provided by the sister of the deceased who is under no legal obligation to do anything for them.

**XL.**

Decedent's legitimate mother is over 80 years old and can neither provide nor care for her grandchildren.

WHEREFORE, petitioner, reiterating the prayer of her original and supplemental and amending petitions as though set forth at length herein, prays that her original and supplemental and amending petitions be supplemented and amended in the above particulars and that, after due proceedings had, there be judgment herein in favor of the petitioner and against the defendants, all as prayed for herein, and for all general and equitable relief.

LAWRENCE J. SMITH  
*Attorney for Petitioner*  
1407 Pere Marquette Building  
New Orleans, Louisiana

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**ORDER**

Let the foregoing supplemental and amending petition be filed as prayed for.

New Orleans, La. this 28th day of January, 1966.

PAUL P. GAROFALO  
*Judge*

CERTIFICATE OF SERVICE (omitted in printing)

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Folios 53 to 57 (omitted in printing)

—57A—

**Letter from Respondents' Attorneys to Judge Garofalo**(Letterhead of Porteous & Johnson,  
New Orleans, Louisiana)

December 10, 1965

Honorable Paul Garofalo  
Judge, Division "G"  
Civil District Court for the  
Parish of Orleans  
Loyola Avenue  
New Orleans, Louisiana

RE: Thelma Levy, et als vs.  
Charity Hospital of Louisiana, et als  
No. 430-566 CDC  
OUR FILE: 3547-65-6

Dear Judge Garofalo:

We have been contacted by counsel for Thelma Levy, et als in connection with Number 430-566 on your docket in which certain Exceptions are set for December 17. Mr. Smith advises us that it will be impossible for him to try these Exceptions at that time, and, in view of his request, we ask that the Exceptions be continued until January 21, 1966, which date is acceptable to both of us.

By carbon copy of this letter, we are advising Mr. Ingard Johannessen of the date of the re-scheduling of these Exceptions, as well as Mrs. Dorothy Wolbrette. Mrs. Wolbrette

represents the Attorney General in connection with the attack on the constitutionality of the law involved herein.

We greatly appreciate your kindness and courtesy in continuing this matter.

With all best wishes and assurances of our friendship,  
we remain

Cordially and sincerely yours,

PORTEOUS & JOHNSON

/s/ WILLIAM A. PORTEOUS, III  
WILLIAM A. PORTEOUS, III

WAP,III:sf

cc—Mr. Lawrence J. Smith  
Mr. Ingard O. Johannesen  
Mrs. Dorothy D. Wolbrette

**Second Supplemental and Amending Petition**

(Filed January 31, 1966)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS****STATE OF LOUISIANA**

Now into court comes Thelma Levy, petitioner in the above numbered and entitled cause, and respectfully represents that she desires to supplement and amend her original and supplemental and amending petition in the following respect:

1. By adding an additional paragraph following paragraph XXI to be numbered paragraph XXI(A) to read as follows:

**XXI(A).**

In addition, a finding of no right or cause of action based on illegitimacy would, as to all parties concerned, be in violation of the Louisiana and United States Constitutional provisions that "No State shall . . . pass any bill of attainder," or provisions relating thereto.

WHEREFORE, petitioner, reiterating the prayer of her original petition as though set forth at length herein, prays that her original and supplemental and amending petitions be supplemented and amended in the above particulars and that, after due proceedings had, there be judgment herein in favor of the petitioner and against the defendants, all as prayed for herein, and for all general and equitable relief.

LAWRENCE J. SMITH

*Attorney for Petitioner*

1407 Pere Marquette Building

New Orleans, La.

## O R D E R

Let the foregoing supplemental and amending petition  
be filed as prayed for.

New Orleans, La. this 21st day of January, 1966.

PAUL P. GAROFALO

Judge

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CERTIFICATE OF SERVICE (omitted in printing)

Folios 60 to 64 (omitted in printing)

**Notice of Judgment**  
(Filed January 31, 1966)

STATE OF LOUISIANA

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

To:—

Lawrence L. Smith, Attorney for Plaintiff  
A. J. Levy, Attorney for Plaintiffs  
Mrs. Dorothy Wolbrette, Asst. Attorney General  
Ingard Johannesen, Attorney for Charity Hospital  
William A. Porteous, III, Attorney for Dr. William J.  
Wing et al.

Attorneys for Parties.

Dear Sirs:

In accordance with Article 1913 C. C. P., you are hereby notified that the Court has on January 31st, 1966, judgment rendered and signed in the above cause.

A note is being made on the docket of the mailing of this notice to the Counsel of record for each party.

Mailed January 31, 1966.

Yours very truly,

(Signature illegible)

*Deputy Clerk, Civil District Court  
Minute Clerk Division "G"*

[Stamp—No. —, Filed Jan. 31, 1966 (signature illegible),  
Deputy Clerk, Civil District Court]

**Judgment****CIVIL DISTRICT COURT IN AND FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

THIS CAUSE CAME ON for hearing on January 21, 1966  
on the various exceptions filed by the defendants herein.

Present:

Mr. Lawrence J. Smith  
*Attorney for Plaintiffs*

Mr. A. J. Levy  
*Attorney for Plaintiffs*

Mrs. Dorothy Wolbrette  
*Assistant Attorney General*  
*Attorney for the State of Louisiana and*  
*representing the Attorney General*

Mr. Ingard O. Johannesen  
*Attorney for the Charity Hospital*  
*of Louisiana*

Mr. William A. Porteous, III  
*Attorney for Dr. Willard J. Wing and*  
*Interstate Fire and Casualty Co.*

THIS CAUSE CAME ON for additional hearing on January 28, 1966.

Present:

Mr. Lawrence J. Smith  
*Attorney for Plaintiffs*

Mr. William A. Porteous, III

*Attorney for Dr. Willard J. Wing and  
Interstate Fire and Casualty Co.*

CONSIDERING the original petition and the three supplemental petitions filed herein, the various exceptions filed by the parties defendant and the legal memorandum submitted by counsel, the legal arguments advanced in open Court and the stipulations of counsel and for reasons orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED (1) that the State of Louisiana is dismissed from this action, (2) that the exceptions brought on behalf of Charity Hospital of Louisiana are continued indefinitely, (3) that the exceptions brought on behalf of Dr. Willard J. Wing and Interstate Fire and Casualty Company are sustained and the action of all plaintiffs as against Dr. Willard J. Wing and Interstate Fire and Casualty Company is dismissed.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 31st day of January 1966.

New Orleans, Louisiana.

PAUL P. GAROFALO  
*Judge*

**Petition for Appeal and Notices**

(Filed April 21, 1966)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

The petition of Thelma Levy, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: Ronald Bell, Regina Levy, Cecilia Levy, Linda Levy, and Austin Levy, plaintiff in the above entitled and numbered cause, respectfully represents that:

**I.**

Petitioner desires to appeal devolutively from the final judgment rendered in the above case on the 31st day of January, 1966.

WHEREFORE, petitioner prays that she be granted a devulsive appeal in the above entitled and numbered cause returnable unto the Court of Appeal, Fourth Circuit, State of Louisiana within the delays fixed by law without the necessity of her furnishing security.

**LEVY, SMITH & FORD****BY: LAWRENCE J. SMITH****1407 Pere Marquette Bldg.****New Orleans, Louisiana****524-6165**

**•O R D E R**

Considering the foregoing petition, let Thelma Levy be and she is hereby granted a devolutive appeal from the judgment rendered in the above entitled and numbered cause, returnable in the Court of Appeal, Fourth Circuit, State of Louisiana, on the 13th day of June, 1966 without the necessity of her furnishing security.

New Orleans, Louisiana this 21st day of April, 1966.

**PAUL P. GAROFALO**  
*Judge*

Please serve:

Charity Hospital of Louisiana through

Mr. Ingard O. Johannesen

National Bank of Commerce Building

New Orleans, Louisiana

State of Louisiana through

Mrs. Dorothy Wolbrette

Assistant Attorney General

State of Louisiana

State Capitol

Baton Rouge, Louisiana

Dr. Willard J. Wing and Interstate Fire

and Casualty Company through

William A. Porteous, III

Porteous & Johnson

925 Hibernia Bank Building

New Orleans, Louisiana

**Stipulation**

(Filed August 10, 1966)

**CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS  
STATE OF LOUISIANA**

Stipulation as taken on Friday, January 21, 1966, before  
the Honorable Paul P. Garofalo, Judge presiding.

**APPEARANCES:****LEVY, SMITH & FORD**(By: Mr. Charles A. Levy, Jr.  
and Mr. Lawrence J. Smith)*Attorneys for Plaintiffs***JACK P. F. GREMILLION***Attorney General*

(By: Mrs. Dorothy D. Wolbrette)

*Attorneys for the State of Louisiana***PORTEOUS & JOHNSON**

(By: Mr. Wm. A. Porteous, III)

*Attorneys for Dr. Wing and His Insurer***JOHANNESSEN & ROBERTS**

(By: Mr. Ingard O. Johannessen)

*Attorneys for Charity Hospital of New Orleans*

Mr. Levy: First, I think we ought to get rid of the State as a party, and it is further stipulated, I understand, with consent of counsel, that they have accepted service—

Mrs. Wolbrette: Not the State, the Attorney General accepts service. You see, we should be here because the constitutionality, Article 2315 or its interpretation, has been attacked, and under the Code of Civil Procedure, the Attorney General—all it says is that the Attorney General must be served with a copy of all pleadings in such cases; and he is entitled, if he so wishes, to be heard, but we are not a party to the suit. We are merely observers. I simply represent the Attorney General's office.

The Court: The State of Louisiana is out of the picture completely, but the Attorney General is maintaining its interest conformable to the law which gives them the privilege of being present in all matters which attacks the constitutionality of the State of Louisiana.

Mrs. Wolbrette: That is right. We are not a party to the suit.

Mr. Porteous: She holds my hand, Judge.

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Mr. Levy: Is that in the record?

This, of course, has no effect upon Charity Hospital, this dismissal.

Mr. Johannesen: I think we ought to take up the question about the jury. Neither a State or State agency can be tried by Jury—

Mr. Smith: I think that issue can stand in abeyance until we find out if we are going to have a trial.

(Off the record.)

Mr. Levy: My understanding, as Mr. Porteous just said —mine was as was Mr. Smith's—only the exceptions of Dr. Wing and his insurer are to be brought today.

Mr. Porteous: In setting the rule, I said "Exceptions"; and, frankly, I felt at that time—

Mr. Smith: We haven't researched that and we are not prepared to argue the point of the jury.

The Court: I have no objection.

Mr. Johannesen: I have no objection of holding my exceptions in abeyance to the question of the exception they

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want to argue today. If I have to bring my exceptions today, I want to bring them all today and try them with Mr. Porteous and Mrs. Wolbrette.

The Court: As I take it, you are not prepared to argue the exceptions on the Charity Hospital.

Mr. Johannesen: I have no objection.

The Court: The exceptions with respect to Charity Hospital are continued indefinitely. When you are ready for them to be urged, you raise them at that time. What other exceptions are to be argued?

Mr. Porteous: One is a preemptory and dilatory exception on the main issue, illegitimacy. The second exception is a preemptory exception to the effect that this mother's claim comes too late.

Mr. Smith: Those are the only two points we are prepared to argue.

(Argument by counsel.)

Mr. Levy: May we enter into a stipulation into the record?

Mrs. Wolbrette: I am not a party to this stipulation. I don't agree. I can't stipulate to these facts.

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Mr. Levy: This stipulation is by and between petitioner and Dr. Wing and his insurer. And this stipulation is solely for purposes of this exception, and it does not bind Dr. Wing nor his insurer upon trial of the matter.

**Mr. Smith:** This is with regard to any proof of damages or relationship at the trial on the merits. These are stipulations of facts between these parties for the purposes of these exceptions.

**Mrs. Wolbrette:** Can you stipulate that you are adding this as a paragraph of your petition, then it would have to be taken as proof for the purpose of the exception.

**The Court:** For the purpose of No Right or Cause of Action. What is the stipulation? What is the item?

**Mr. Levy:** The stipulation is to the effect, setting up the fact of the illegitimacy and the subsequent relationship between the mother and the children.

**Mr. Porteous:** Why don't you read your stipulation to the Judge so the Judge can get the meat of it?

**Mr. Levy:** Shall I?

—75—

**The Court:** In your supplemental and amended petition, do you declare in it that they are illegitimate?

**Mr. Levy:** No. The question of illegitimacy was never raised as such in the petition, as I understand it.

**Mr. Smith:** The stipulation between counsel for Dr. Wing and his insurer and counsel for plaintiff is that Louise Levy was a Negro mother of five illegitimate children.

(Off-the-record discussion.)

#### C E R T I F I C A T E

I do hereby certify that the foregoing is a true and correct transcript as reported and transcribed by me.

A. CHARLES BORRELLO  
*Official Court Reporter.*

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CLERK'S CERTIFICATE (omitted in printing)

**Notice of Appeal****STATE OF LOUISIANA****CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

To: Dr. Willard J. Wing and Interstate Fire and Casualty Company, Through their attorney of record, Mr. William A. Porteous, III, Porteous and Johnson, 925 Hibernia Bank Bldg., New Orleans, La.

You ARE HEREBY NOTIFIED that on the 21st day of April 1966, Thelma Levy, etc., et al., plaintiff filed a petition for a devolutive appeal to the Court of Appeal, Fourth Circuit, State of Louisiana, in the above numbered and entitled cause.

The appeal is returnable to the said court of Appeal on the 13th day of June, 1966.

IN WITNESS WHEREOF, I hereunto affix my official signature and the seal of my office, this 22nd day of April, 1966.

(Signature illegible)  
*Deputy Clerk Civil District Court*

**Notice of Appeal****STATE OF LOUISIANA****CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

To: Charity Hospital of Louisiana, Through its attorney of record, Mr. Ingard O. Johannsen, National Bank of Commerce Bldg., New Orleans, La.

You ARE HEREBY NOTIFIED that on the 21st day of April, 1966, Thelma Levy, etc., et al., plaintiff filed a petition for a devolutive appeal to the Court of Appeal, Fourth Circuit, State of Louisiana, in the above numbered and entitled cause.

The appeal is returnable to the said court of Appeal on the 13th day of June, 1966.

IN WITNESS WHEREOF, I hereunto affix my official signature and the seal of my office, this 22nd day of April, 1966.

(Signature illegible)

*Deputy Clerk Civil District Court*

**Notice of Appeal****STATE OF LOUISIANA****CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS**

To: State of Louisiana, Through its attorney of record,  
Mrs. Dorothy Wolbrette, Assistant Attorney General,  
State of Louisiana, State Capitol, Baton Rouge, La.

You ARE HEREBY NOTIFIED that on the 21st day of April, 1966, Thelma Levy, etc., et als., plaintiff filed a petition for a devolutive appeal to the Court of Appeal, Fourth Circuit, State of Louisiana, in the above numbered and entitled cause.

This appeal is returnable to the said court of Appeal on the 13th day of June, 1966.

IN WITNESS WHEREOF, I hereunto affix my official signature and the seal of my office, this 22nd day of April, 1966.

(Signature illegible)  
*Deputy Clerk Civil District Court*

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Folios 80-95 (omitted in printing)

**Application for Rehearing**

(Filed November 18, 1966)

—96—

**COURT OF APPEAL, FOURTH CIRCUIT****STATE OF LOUISIANA****No. 2355**

THELMA LEVY, in her capacity as administratrix of the  
SUCCESSION OF LOUISE LEVY, and as the tutrix of and on  
behalf of the minor children of Louise Levy, said  
children being: RONALD BELL, REGINA LEVY, CECILIA  
LEVY, LINDA LEVY and AUSTIN LEVY,

vs.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF  
LOUISIANA AT NEW ORLEANS, BOARD OF ADMINISTRATORS  
and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

The petition of Thelma Levy, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: Ronald Bell, Regina Levy, Cecilia Levy, Linda Levy and Austin Levy, plaintiff and appellant in the above entitled and numbered cause, respectfully represents, that the judgment of this honorable court rendered herein on the 7th day of November, 1966, affirming the judgment of the Civil District Court for the Parish of Orleans, which sustained defendants' exceptions and dismissed plaintiff's suit is erroneous and contrary to law and is prejudicial to the plaintiff for the following reasons:

## I

The interpretation of Civil Code Article 2315 so as to prevent illegitimate children, and especially children under such circumstances as appear in this case from recovering for the wrongful death of their mother, is unconstitutional as violative of both due process and equal protection under both the Louisiana and United States Constitution.

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## II

The denial of the right of recovery to illegitimate children for the wrongful death of a parent does not bear a substantial relation to the general health, morals or general welfare of the people.

## III

There is discrimination in the denial of the right of illegitimate children to recover based on race, color or creed, as the interpretation results in unconstitutional discrimination as to both the Negro and as to the poor, all in violation of the Federal and Louisiana prohibitions against due process and equal protection.

## IV

Under Louisiana law in this factual situation, these illegitimate children should be able to recover.

## V

Petitioner files herewith in connection with this application for a new hearing a brief in support thereof and shows that for the reasons hereinabove stated and amplified in the said brief a rehearing should be granted herein.

WHEREFORE, petitioner prays that a rehearing be granted in this cause and that after due proceedings had the judgment rendered herein on the 7th day of November, 1966, be set aside and reversed and that there be judgment herein dismissing the defendants' exceptions and remanding this cause to the Civil District Court for further proceedings therein.

LEVY, SMITH & FORD

By: ADOLPH J. LEVY

1407 Pere Marquette Bldg.

New Orleans, Louisiana

524-6165

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CERTIFICATE OF SERVICE (omitted in printing)

Folios 29-1111 (omitted in printing)

**Opinion of the Court of Appeal for the Fourth Circuit,  
State of Louisiana**

No. 2355

THELMA LEVY, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: RONALD BELL, REGINA LEVY, CECELIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A. B. C. INSURANCE COMPANIES.

Appeal from the Civil District Court for the Parish of Orleans, State of Louisiana, No. 490-355.  
Honorable Paul P. Garofalo, Judge

Louis H. Yarrut  
Judge

(Court composed of Judges Louis H. Yarrut, L. Julian Samuel and Paul E. Chazez)

LEVY, SMITH & FORD  
ADOLPH J. LEVY,  
for Plaintiff-Appellant

[Stamp—Nov. 7, 1966]

PORTEOUS & JOHNSON

WILLIAM A. PORTEOUS, III

for W. J. Wing, M.D. and Interstate Fire and Casualty Company, Defendants and Appellees

MRS. DOROTHY WOLBRETTE, Assistant Attorney General  
for State of Louisiana, Defendant-Appellee

INGARD O. JOHANNESEN, Affirmed  
for Charity Hospital, Defendant-Appellee

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This is an appeal from a judgment maintaining exceptions of no right or cause of action to a suit filed on behalf of minor children for the wrongful death of their mother.

The children are admittedly illegitimate and have never been legitimated.

Plaintiff-Appellant, on behalf of the children, contends that the denial of this right to illegitimate children solely because of their status is, as to them, a denial of due process and equal protection under law under both the Louisiana and United States Constitutions (La. Const., Article 1, Section 2; U. S. Const. 5th and 14th Amendments), and because it bears no real or substantial relation to the general health, morals, or welfare of the people, citing Reynolds v. Louisiana Board of Alcoholic Beverage Control, 249 La. 127, 185 So. 2d 794.

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The case of Reynolds v. Louisiana Board of Alcoholic Beverage Control, cited supra, was based on the fact that the statute bore no substantial relation to the general health, morals, or general welfare of the people. Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock.

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana.

Our jurisprudence is well established that "child" means legitimate child, and that recovery is denied both to illegitimate and putative children for the ~~wrongful~~ death of a parent. *Board of Com'r's v. City of New Orleans*, 223 La. 199, 65 So. 2d 313; *Sesostris Youchican v. Texas & P. Ry. Co.*, 147 La. 1080, 86 So. 551; *Jackson v. Lindlom*, 84 So. 2d 101; see also *Chivers v. Couch Motor Lines, Inc.*, 159 So. 2d 544; *Scott v. La Fontaine*, 148 So. 2d 780; *Buie v. Hester*, 147 So. 2d 733; 14 Tul. L. Rev. 613.

That an illegitimate child was dependent upon the deceased parent for support makes no difference. *Board of Com'r's v. City of New Orleans*, *supra*.

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Mere acknowledgment will not serve to cure a defect in legitimacy. *Lynch v. Knoop*, 118 La. 611, 43 So. 252; *Scott v. La Fontaine*, *supra*.

Since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color, or creed; we can find no basis for the contention of unconstitutionality, and can find no jurisdiction of our courts to such effect. The judgment appealed from is affirmed; Appellant to pay all costs of this appeal.

Judgment Affirmed.

Rehearing Refused Dec 5 1966

Writ Refused Jan 20 1967

**Order Denying Writ****SUPREME COURT OF LOUISIANA****NEW ORLEANS, 70112****No. 48,518****January 20, 1967**

**THELMA LEVY, in her capacity as administratrix of the  
succession of Louise Levy, etc.**

v.

**THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF  
LOUISIANA AT NEW ORLEANS, BOARD OF ADMINISTRATORS, ET AL.**

**In re: Thelma Levy, etc., applying for certiorari, or writ  
of review, to the Court of Appeal, Fourth Circuit, Parish  
of Orleans**

**Writ refused. No error of law in the judgment of the Court  
of Appeal**

**A TRUE COPY**

/s/ FWH

**Clerk's Office**

/s/ JBF

**Supreme Court of Louisiana**

/s/ JBH

**New Orleans**

/s/ EHMcC

**January 20, 1967**

/s/ WBH

(Signature illegible)

/s/ JWS

*Deputy Clerk*

/s/ FWS

—117—

**Notice of Appeal to the Supreme Court  
of the United States**

(Filed April 19, 1967)

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION "G"

DOCKET 4

No. 4130-566

THELMA LEVY, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: RONALD BELL, REGINA LEVY, CECILLA LEVY, LINDA LEVY and AUSTIN LEVY,

*Appellant,*

versus

THE STATE OF LOUISIANA, through the CHARITY OF HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES,

*Appellees.*

Filed: April 19, 1967

(Signature illegible)

*Deputy Clerk*

- I. Notice is hereby given that Thelma Levy, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: Ronald Bell, Regina

Levy, Cecilia Levy, Linda Levy and Austin Levy, the appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, denying the petition for writs of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, and from the decision of the Court of Appeal, Fourth Circuit, affirming the dismissal entered in this action, the decision of the Louisiana Supreme Court being rendered on January 20, 1967. This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

The entire record in this case, however, said record *not* to include memoranda filed herein.

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III. The following questions are presented by this appeal:

1. Whether the denial of a right or cause of action to illegitimate children for the wrongful death of their mother, when the denial is based solely upon their illegitimate status, is, as to them, a denial of due process and equal protection under the United States Constitution, especially when the record discloses that their mother treated them as any good mother would treat her own legitimate children.

2. Whether the requirement of legitimacy for a recovery for the wrongful death of a parent results in a denial of due process and equal protection within the meaning of the United States Constitution because it is discriminatory against the poor and against the Negro.

3. Whether the denial of a right or cause of action to illegitimate children for the wrongful death of their mother

bears no real or substantial relation to general health, morals, or welfare of the people and is therefore violative of the Fourteenth Amendment to the United States Constitution.

ADOLPH J. LEVY

*Attorney for Appellant*

Levy, Smith & Paillet

1407 Pere Marquette Building

New Orleans, La. 70112

524-6165

—119—

CERTIFICATE OF SERVICE (omitted in printing)

-120-

**Letter from Petitioner's Attorneys to the Clerk,  
Fourth Circuit Court of Appeal**

(Letterhead of Levy, Smith & Paillet,  
New Orleans, Louisiana 70112)

April 20, 1967

430-566

Clerk  
Fourth Circuit Court of Appeal  
Civil District Court Building  
New Orleans, Louisiana

Re: Thelma Levy, etc. vs.  
Charity Hospital, et al.  
No. 2355

Dear Sir:

I would appreciate your filing the enclosed Notice of Appeal to the Supreme Court of the United States. I have filed a similar Notice with the Clerk of the Civil District Court for the Parish of Orleans. I am filing this additional Notice with you out of an abundance of caution, as it is not clear whether this Notice should be filed in this Court or in the Civil District Court. Rule 10 (3) of the United States Supreme Court provides that "The Notice of Appeal shall be filed with the Clerk of the Court possessed of the record". Because this Court and the Civil District Court are possessed of a record, I am filing my Notice in both Courts:

I would appreciate your conferring with the Clerk of the Civil District Court about this matter.

Very truly yours,

ADOLPH J. LEVY

AJD:SW

ccs: MRS. DOROTHY D. WOLBRETTÉ

*Assistant Attorney General*

*State of Louisiana*

State Capitol

Baton Rouge, Louisiana

MR. INGARD O. JOHANNESEN

National Bank of Commerce Bldg.

New Orleans, La.

*Clerk,*

Civil District Court

MR. WILLIAM A. PORTEOUS, III

Porteous & Johnson

925 Hibernia Bank Bldg.

New Orleans, La.

**Notice of Appeal to the Supreme Court  
of the United States**

**(Filed April 20, 1967)**

**COURT OF APPEAL**

**FOURTH CIRCUIT**

**STATE OF LOUISIANA**

**No. 2355**

---

**THELMA LEVY, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children being: RONALD BELL, REGINA LEVY, CECELIA LEVY, LINDA LEVY and AUSTIN LEVY,**

**versus**

**THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.**

---

I. Notice is hereby given that Thelma Levy, in her capacity as administratrix of the Succession of Louise Levy, and as the tutrix of and on behalf of the minor children of Louise Levy, said children being: Ronald Bell, Regina Levy, Cecelia Levy, Linda Levy and Austin Levy, the appellant above named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Louisiana, denying the peti-

tion for writs of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, and from the decision of the Court of Appeal, Fourth Circuit, affirming the dismissal entered in this action, the decision of the Louisiana Supreme Court being rendered on January 20, 1967. This appeal is taken pursuant to 28 U. S. C. Section 1257(2).

II. The clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

The entire record in this case, however, said record *not* to include memoranda filed herein.

—122—

III. The following questions are presented by this appeal:

1. Whether the denial of a right or cause of action to illegitimate children for the wrongful death of their mother, when the denial is based solely upon their illegitimate status, is, as to them, a denial of due process and equal protection under the United States Constitution, especially when the record discloses that their mother treated them as any good mother would treat her own legitimate children.

2. Whether the requirement of legitimacy for a recovery for the wrongful death of a parent results in a denial of due process and equal protection within the meaning of the United States Constitution because it is discriminatory against the poor and against the Negro.

3. Whether the denial of a right or cause of action to illegitimate children for the wrongful death of their mother bears no real or substantial relation to general health, morals, or welfare of the people and is therefore violative

of the Fourteenth Amendment to the United States Constitution.

ADOLPH J. LEVY

*Attorney for Appellant*

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1407 Pere Marquette Building

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CERTIFICATE OF SERVICE (omitted in printing)

**Motion for Extension of Time**

(Filed June 6, 1967)

**COURT OF APPEAL****FOURTH CIRCUIT****STATE OF LOUISIANA**

No. 2355

On motion of Thelma Levy, appearing herein through her undersigned counsel and on suggesting to the Court that the time within which her appeal must be docketed in the United States Supreme Court is on or about June 19, 1967; and on further suggesting to the Court that an additional sixty (60) days is required by counsel in order to prepare all necessary papers, comply with all rules of the United States Supreme Court and to do further research for this cause; and on further suggesting to the Court that the additional time will suffice within which these requirements may be met.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Mover be granted an additional sixty (60) days within which she may file her Jurisdictional Statement in the United States Supreme Court.

New Orleans, Louisiana, this 6 day of June, 1967.

R. T. McBRIDE

Judge

LEVY, SMITH & PALET

BY: ADOLPH J. LEVY

*Attorney for Thelma Levy*

1407 Pere Marquette Building

New Orleans, Louisiana 70112

524-6165

CERTIFICATE OF SERVICE (omitted in printing)





FILED

IN THE

Supreme Court of the United States

JOHN F. DAVIS, CLERK

OCTOBER TERM 1967

508

No. \_\_\_\_\_

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

JURISDICTIONAL STATEMENT

NORMAN DORSEN

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1967

No. .....

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THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

---

**JURISDICTIONAL STATEMENT**

Appellant appeals from the judgment of the Supreme Court of Louisiana refusing to grant certiorari from the decision of the Court of Appeal, Fourth Circuit, Parish of Orleans, which affirmed the dismissal by the Civil District Court for the Parish of Orleans of appellant's petition for damages for wrongful death. Appellant submits this Statement to show that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented. The appeal is taken pursuant to Title 28 of the United States Code, Section 1257(2).

Appellant filed an action for wrongful death under La. Civ. Code art. 2315 in the Civil District Court for the Parish of Orleans on December 16, 1964. The District Court dismissed the action on January 31, 1966. The Court of Appeal, Fourth Circuit, affirmed this dismissal on November 7, 1966. A timely application for rehearing was denied on December 5, 1966. The Louisiana Supreme Court denied the petition for certiorari or writ of review on January 20, 1967.

### **Opinions Below**

The denial of certiorari by the Supreme Court of Louisiana is reported at 250 La. 25, 193 So. 2d 530, and is set out *infra* at p. 19. The opinion of the Court of Appeal, Fourth Circuit, Parish of Orleans is reported at 192 So. 2d 193, and is set out *infra* at pp. 16-18. The Civil District Court for the Parish of Orleans wrote no opinion; its decision is found in the judgment, dated January 31, 1966, contained in the Appendix as set out at pp. 13-15, *infra*.

### **Jurisdiction.**

The appellants filed their notice of appeal to this Court in the District Court and the Court of Appeal on April 19, 1967. On June 6, 1967, Hon. R. T. McBride of the Louisiana Court of Appeal, Fourth Circuit, enlarged appellant's time to file this Jurisdictional Statement and to docket the appeal to and including August 16, 1967.

### Statute Involved

Louisiana Civil Code article 2315 provides as follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

## The Question Presented

Whether Louisiana Civil Code article 2315 as construed and applied is invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution because it denies a right of action to illegitimate children for the wrongful death of their mother solely on their status as persons of illegitimate birth.

## Statement of the Case

Appellant brought this action under La. Civ. Code art. 2315 on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the A.B.C. Insurance Companies, later designated as the Interstate Fire and Casualty Company (R. 5-9, 37).

The Third Supplemental and Amending Petition, whose allegations must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Catholic Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (R. 50-52).

As alleged in the Petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with symptoms of tiredness, dizziness, weakness, chest pain and

slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but he failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she was brought to the hospital in a comatose condition, and at that time an adequate examination resulted in the correct diagnosis of her illness as hypertension uremia. She died on March 29, 1964 (R. 5-9).

Dr. Wing and the Interstate Fire and Casualty Company moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimate children (R. 20-21). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed<sup>1</sup> (R. 66-67). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother. The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the Fourteenth Amendment (R. 112-115). Appellant petitioned the Supreme Court

<sup>1</sup> The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital were continued. No appeal was taken with respect to either of these parties. The judgment as to Dr. Wing and the Interstate Fire and Casualty Company was final in all respects.

of Louisiana for a writ of certiorari on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (R. 116).

### The Question Is Substantial

The question whether Louisiana can apply its wrongful death statute to deprive children of a cause of action for damages for the negligent death of their mother on the sole ground that they are illegitimate is plainly substantial under governing decisions of this Court.

1. The test that the Court has employed under the equal protection clause, enunciated as recently as last Term, is "whether the classifications drawn by any statute constitute an arbitrary and invidious discrimination." *Loving v. Virginia*, 387 U. S. 1817, 1823 (1967). See also *McLaughlin v. Florida*, 379 U. S. 184 (1964); *Carrington v. Rash*, 380 U. S. 89 (1965); *Harper v. Virginia State Board of Elections*, 383 U. S. 663 (1966).

The purpose of wrongful death statutes is to reimburse those who stand to lose through the death of another, usually a close relative, whether through contributions based on past earnings or through loss of services, training, nurture, education and guidance. See Speiser, Recovery for Wrongful Death iii (1967). Judged by this purpose, the denial to illegitimate children of a right to recover for the wrongful death of their mother is certainly "arbitrary and invidious." The children here were as close to their mother as any children born in wedlock could be. They were fully dependent on her for the necessities of life as well as the vital intangibles of "training, nurture,

and guidance." And they now are losing as much as—indeed, because of the absence of a father, probably more than—legitimate children in comparable circumstances. The classification of the Louisiana statute which in effect treats the illegitimate as a "constitutional non-person,"<sup>1a</sup> is, accordingly, not "reasonable in light of its purpose," *McLaughlin v. Florida*, *supra* at 191; *Carrington v. Rash*, *supra* at 93, and it denies these illegitimate children the equal protection of the laws.<sup>2</sup>

2. The Louisiana Court of Appeal justified its discriminatory application of the wrongful death act on the ground that "it discourages bringing children into the world out of wedlock." *Infra* p. 17. But the court cited no evidence to support this proposition, and what statistics exist serve to belie it. Thus, in the face of the pattern of legislation penalizing illegitimacy, the rate of births out of wedlock has climbed steadily. In 1950, the rate of illegitimacy in the United States was approximately one out of every twenty-five live births. In 1960 the ratio was approximately one out of nineteen. In 1964 out of a little more than 4 million live births, 275,700 (one in fifteen) were illegitimate.<sup>3</sup> In Louisiana, the rate of illegitimacy has increased

<sup>1a</sup> Cf. Fortas, Equal Rights—For Whom?, 42 N. Y. U. L. Rev. 401, 408 (1967).

<sup>2</sup> In a closely analogous area, two courts have recently held that the denial to a wife of the right to sue for loss of consortium of her husband, when the husband may sue for loss of the consortium of his wife, violates the wife's right to equal protection of the laws. See *Owens v. Illinois Baking Corp.*, 260 F. Supp. 820 (W. D. Mich. 1966); *Clem v. Brown*, 207 N. E. 2d 398 (Ohio Ct. of Common Pleas, 1965).

<sup>3</sup> Statistical Abstract of the United States, 47-49 (1966). See Foster and Freed, Unequal Protection: Poverty and Family Law, 42 Ind. L. J. 192, 220 (1967).

as well and stands at a level which is significantly higher than the national average. In 1960, out of 90,126 live births, 8,248 (approximately 1 in 11) were illegitimate. In 1964, out of 86,060 live births, 9,567 (approximately 1 in 9) were illegitimate.\*

Moreover, it is unreasonable to harm a class of blameless persons in order to control the conduct of persons not within the class. The discriminatory legislation affects the child, not the parents, and as such is constitutionally defective. In *Oyama v. California*, 332 U. S. 633 (1948), California had applied its Alien Land Law to escheat land claimed by the son of an alien. This Court invalidated the law on the ground that extraordinary procedural burdens were imposed upon the son depriving him of the equal protection of the laws. The Court held that an American citizen could not be deprived of land solely on the basis of his father's nationality.<sup>5</sup>

The justification of the Louisiana court is not only contradicted by statistical evidence, but by common sense. It would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death. Surely such a fanciful assertion, which is at the root of the opinion below, will not suffice to justify the denial of a "property right" (La. Civil Code Article 2315, *supra* at 3) to children

\* Report of the Division of Public Health, p. 21, Louisiana State Board of Health (1964).

<sup>5</sup> The Louisiana statute also contravenes the biblical injunction that "the son shall not bear the iniquity of the father with him." Ezekiel 18:23.

who have lost their mother through another's wrongful conduct.<sup>6</sup>

The unsupported assertion that denial of recovery to illegitimates serves a deterrent purpose is particularly indefensible because the state plainly had the burden of supporting the statutory classification. This case does not involve a statute regulating economic interests where distinctions are presumptively valid and can be upset under the equal protection clause only by a strong showing. Compare *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955) with *Morey v. Doud*, 354 U. S. 457 (1957).

The state legislation here discriminates against individuals because of ancestry, which like color is a condition of birth wholly beyond their control.<sup>7</sup> In the absence of

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<sup>6</sup> The manifold forms of discrimination against illegitimate that exist in virtually every state are coming under increasing attack. See, e.g., Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 492 (1967); Foote, Levy and Sander, Cases on Family Law 72-73 (1966); Foster and Freed, Unequal Protection: Poverty and Family Law, *supra* at 220. But the constitutionality of discriminatory legislation in the areas of intestacy and support are not presented here; the instant case offers the most egregious example of invidious discrimination against this class.

Louisiana is the only jurisdiction that deprives an illegitimate child of an equal right to sue for the wrongful death of his mother. See Annotation, 72 A. L. R. 2d 1235, 1237 (1960); Speiser, *supra* at 589-590, n. 9. This is particularly shocking because the reasons generally offered to justify denial of benefits to illegitimate are irrelevant in a suit for the wrongful death of the mother. Maternity cannot be in issue, and illegitimacy has no bearing, as the facts of this case reflect, on the child's relationship with the mother. Moreover, the alleged justification of deterring immoral conduct is defective. Even if the parents are concerned with the rights of possible offspring, they are not likely to contemplate the possibility of their own death by the wrongful act of another person.

<sup>7</sup> These illegitimate children are being denied rights solely because of the accident of their birth. This Court has held that penalties cannot be imposed because of personal status involuntarily

any overriding state interest—which the state here has wholly failed to demonstrate—there should be no constitutional distinction with respect to this matter between discrimination based on illegitimacy and discrimination based on race. This is all the more true because statutes punishing illegitimates tend to fall most heavily on Negroes,<sup>8</sup> as in this case, and in some instances may have been designed to achieve this end. See Bell, *Aid to Dependent Children*, 181-86 (1965). Accordingly, the Louisiana statute is "highly suspect" and subject to "rigid scrutiny" in this Court. *Loving v. Virginia*, *supra*; *McLaughlin v. Florida*, *supra*; *Korematsu v. United States*, 323 U. S. 214 (1944). See also *Harper v. State Bd. of Elections*, *supra* at 669.

3. Louisiana's refusal to permit suit for wrongful death by illegitimate children is also objectionable on due process grounds. While the courts may not sit as super-legislatures and use the Fourteenth Amendment to strike down regulatory laws because they seem unwise, e.g., *Williamson v. Lee Optical Co.*, *supra* at 488, where a statute involves an aspect of individual liberty, the due process clause requires a greater showing of a valid connection between a proper legislative purpose and the law designed to implement that objective. See *Griswold v. Connecticut*, 381 U. S. 479, 492 (1965) (Goldberg, J. concurring); *Poe v.*

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*entered into. Robinson v. California*, 370 U. S. 660 (1962); see also *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966).

<sup>8</sup> In 1964, out of a total of 275,700 illegitimate births in the United States, 161,300 were non-white. This represents nearly one-fourth of all non-white births in the United States for that year. Statistical Abstract of the United States, *supra*. In Louisiana in 1964, out of a total of 9,567 illegitimate live births, 8,441 (88%) were non-white. Report of the Division of Public Health, *supra*.

*Ullman*, 367 U. S. 497, 542-44 (1961) (Harlan, J. dissenting); *Bolling v. Sharpe*, 347 U. S. 497, 499-500 (1954); *Meyer v. Nebraska*, 262 U. S. 390, 399-400 (1923).

The principal justification for the exercise of state police power in this area is the right of a state to regulate sexual activity, and specifically its power to discourage promiscuity. Another justification for these laws relies upon the promotion of marital stability and family unity, both of which are said to be threatened by forced support of illegitimates.

Neither of these theories is persuasive or constitutionally adequate to support the result in this case. In the first place, as pointed out above, there is no proof supporting the assumption that such measures will deter illegitimacy. And in view of the constitutionally objectionable criteria used to penalize illegitimate children—ancestry and blood relationship—the burden surely should rest on the state to demonstrate their effectiveness. *Loving v. Virginia*, *supra* at 1822. Secondly, even assuming effective deterrence, there is a substantial question whether the Fourteenth Amendment permits a state to penalize persons for the acts of others over whom they have no control. See Krause, Equal Protection for the Illegitimate, *supra* at 492; Cf. *Oyama v. California*, *supra*; *NACP v. Overstreet*, 384 U. S. 118 (1966) (dissenting opinion).

## CONCLUSION

For the reasons stated above, a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

Respectfully submitted,

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*Of Counsel*

August 1967



**APPENDIX**

## APPENDIX

### Judgment of the Civil District Court for the Parish of Orleans

CIVIL DISTRICT COURT

IN AND FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

DIVISION OF LOUISIANA

No. 430-566

Docket 4

---

THELMA LEVY, Administratrix of the Estate of LOUISE LEVY,  
and as Tutrix for the Minors, RONALD BELL, REGINA  
LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY.

vs.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF  
LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and  
W. J. WING, M.D. and A. B. C. INSURANCE COMPANIES.

---

Filed: .....

*Deputy Clerk*

THIS CAUSE CAME ON for hearing on January 21, 1966  
on the various exceptions filed by the defendants herein.

Present:

**Mr. Lawrence J. Smith**

**Attorney for Plaintiffs**

**Mr. A. J. Levy**

**Attorney for Plaintiffs**

**Mrs. Dorothy Wolbrette**

**Assistant Attorney General**

**Attorney for the State of Louisiana**

**and representing the Attorney**

**General**

**Mr. Ingard O. Johannessen**

**Attorney for the Charity Hospital of**

**Louisiana**

**Mr. William A. Porteous, III**

**Attorney for Dr. Willard J. Wing and**

**Interstate Fire and Casualty Co.**

THIS CAUSE CAME ON for additional hearing on January  
28, 1966.

Present:

**Mr. Lawrence J. Smith**

**Attorney for Plaintiffs**

**Mr. William A. Porteous, III**

**Attorney for Dr. Willard J. Wing and**

**Interstate Fire and Casualty Co.**

CONSIDERING the original petition and the three supplemental petitions filed herein, the various exceptions filed by the parties defendant and the legal memorandum submitted by counsel, the legal arguments advanced in open

Court and the stipulations of counsel and for reasons orally assigned;

IT IS ORDERED, ADJUDGED AND DECREED (1) that the State of Louisiana is dismissed from this action, (2) that the exceptions brought on behalf of Charity Hospital of Louisiana are continued indefinitely, (3) that the exceptions brought on behalf of Dr. Willard J. Wing and Interstate Fire and Casualty Company are sustained and the action of all plaintiffs as against Dr. Willard J. Wing and Interstate Fire and Casualty Company is dismissed.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 31st day of January 1966.

New Orleans, Louisiana

PAUL P. GAROFALO

---

*Judge*

## Opinion of the Court of Appeal

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**THELMA LEVY, in Her Capacity as Administratrix of the Succession of LOUISE LEVY, and as the Tutrix of and on Behalf of the Minor Children of LOUISE LEVY, Said Children Being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and ASTIN LEVY,**

v.

**THE STATE OF LOUISIANA Through the CHARITY HOSPITAL OF LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A. B. C. INSURANCE COMPANIES.**

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No. 2355

Court of Appeal of Louisiana

FOURTH CIRCUIT

Nov. 7, 1966

Rehearing Denied Dec. 5, 1966

Writ Refused Jan. 20, 1967

Before YARRUT, SAMUEL and CHASEZ, JJ.

YARRUT, Judge.

This is an appeal from a judgment maintaining exceptions of no right or cause of action to a suit filed on behalf of minor children for the wrongful death of their mother.

The children are admittedly illegitimate and have never been legitimated.

Plaintiff-Appellant, on behalf of the children, contends that the denial of this right to illegitimate children solely because of their status is, as to them, a denial of due process and equal protection under law under both the Louisiana and United States Constitutions (La. Const., Article 1, Section 2; U.S. Const. 5th and 14th Amendments), and because it bears no real or substantial relation to the general health, morals or welfare of the people, citing Reynolds v. Louisiana Board of Alcoholic Beverage Control, 249 La. 127, 185 So.2d 794.

The case of Reynolds v. Louisiana Board of Alcoholic Beverage Control, cited supra, was based on the fact that the statute bore no substantial relation to the general health, morals, or general welfare of the people. Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock.

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana.

Our jurisprudence is well established that "child" means legitimate child, and that recovery is denied both to illegitimate and putative children for the wrongful death of a parent. Board of Com'r's v. City of New Orleans, 223 La. 199, 65 So.2d 313; Sesostris Youchican v. Texas & P. Ry. Co., 147 La. 1080, 86 So. 551; Jackson v. Lindlom, La.App., 84 So.2d 101; see also Chivers v. Couch Motor Lines, Inc., La.App., 159 So.2d 544; Scott v. La Fontaine, La.App., 148 So.2d 780; Buie v. Hester, La.App., 147 So.2d 733; 14 Tul.L.Rev. 613.

That an illegitimate child was dependent upon the deceased parent for support makes no difference. *Board of Com'rs v. City of New Orleans, supra.*

Mere acknowledgment will not serve to cure a defect in legitimacy. *Lynch v. Knoop*, 118 La. 611, 43 So. 252, 8 L.R.A., N.S., 480; *Scott v. La Fontaine, supra.*

Since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color, or creed, we can find no basis for the contention of unconstitutionality, and can find no jurisprudence of our courts to such effect. The judgment appealed from is affirmed; Appellant to pay all costs of this appeal.

Judgment affirmed.

**Denial of Certiorari by the Supreme Court  
of Louisiana**

250 La. 25

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THELMA LEVY, in her capacity as administratrix of the  
succession of LOUISE LEVY, etc.

v.

THE STATE OF LOUISIANA Through the CHARITY HOSPITAL OF  
LOUISIANA AT NEW ORLEANS BOARD OF ADMINISTRATORS  
et al.

---

No. 48518

Jan. 20, 1967

In re: Thelma Levy, etc., applying for certiorari, or  
writ of review, to the Court of Appeal, Fourth Circuit,  
Parish of Orleans. 192 So.2d 193.

Writ refused. No error of law in the judgment of the  
Court of Appeal.

**LIBRARY**

**SUPREME COURT. U. S.**

**Supreme Court of the United States**

**OCTOBER TERM, 1967.**

**No. 508**

Office-Supreme Court, U.S.  
FILED

SEP. 18 1967

JOHN F. DAVIS, CLERK

**THELMA LEVY, in her capacity as administratrix of the  
succession of LOUISE LEVY and as tutrix of and on  
behalf of the minor children of LOUISE LEVY, said  
children being: RONALD BELL, REGINA LEVY,  
CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,**

**versus**

**THE STATE OF LOUISIANA through the CHARITY  
HOSPITAL OF LOUISIANA at NEW ORLEANS  
BOARD OF ADMINISTRATORS and W. J. WING,  
M.D., and A. B. C. INSURANCE COMPANIES.**

**Appeal from the Supreme Court of Louisiana.**

**MOTION TO DISMISS AND/OR AFFIRM.**

**PORTEOUS & JOHNSON,  
WILLIAM A. PORTEOUS, JR.,  
925 Hibernia Bank Building,  
New Orleans, Louisiana 70112,  
HONORABLE JACK P. F. GREMILLION,  
ATTORNEY GENERAL,  
State of Louisiana,  
State Capitol Building,  
Baton Rouge, Louisiana.**

SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1967

No.

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A. B. C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

MOTION TO DISMISS AND/OR AFFIRM.

Now into Court through undersigned counsel comes W. J. Wing, M.D., and Interstate Fire and Casualty Company for the purpose of moving for the dismissal and/or, in the alternative, the affirmation of the judgment rendered below in the Supreme Court of the State of Louisiana. Movers with respect represent:

1.

The appeal is not within the jurisdiction of this Court inasmuch as the constitutionality of a State

statute is not involved, but rather what is involved is the interpretation accorded a statute by the Supreme Court of a State.

2.

The appeal herein should be dismissed inasmuch as no substantial Federal question is involved.

3.

The judgment rendered by the Supreme Court of Louisiana should be affirmed inasmuch as the issues raised in this cause are not substantial and need no further argument.

WHEREFORE, movers pray that this appeal be dismissed and/or the judgment below be affirmed. And for all general and equitable relief.

Respectfully submitted,

PORTEOUS AND JOHNSON

*William A. Porteous Jr.*

WILLIAM A. PORTEOUS, JR.,

925 Hibernia Bank Building,

New Orleans, Louisiana 70112.

HONORABLE JACK P. F.

GREMILLION,

ATTORNEY GENERAL,

State of Louisiana,

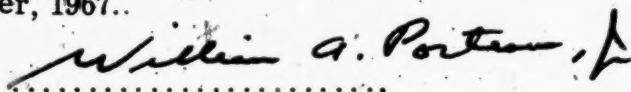
State Capitol Building,

Baton Rouge, Louisiana.

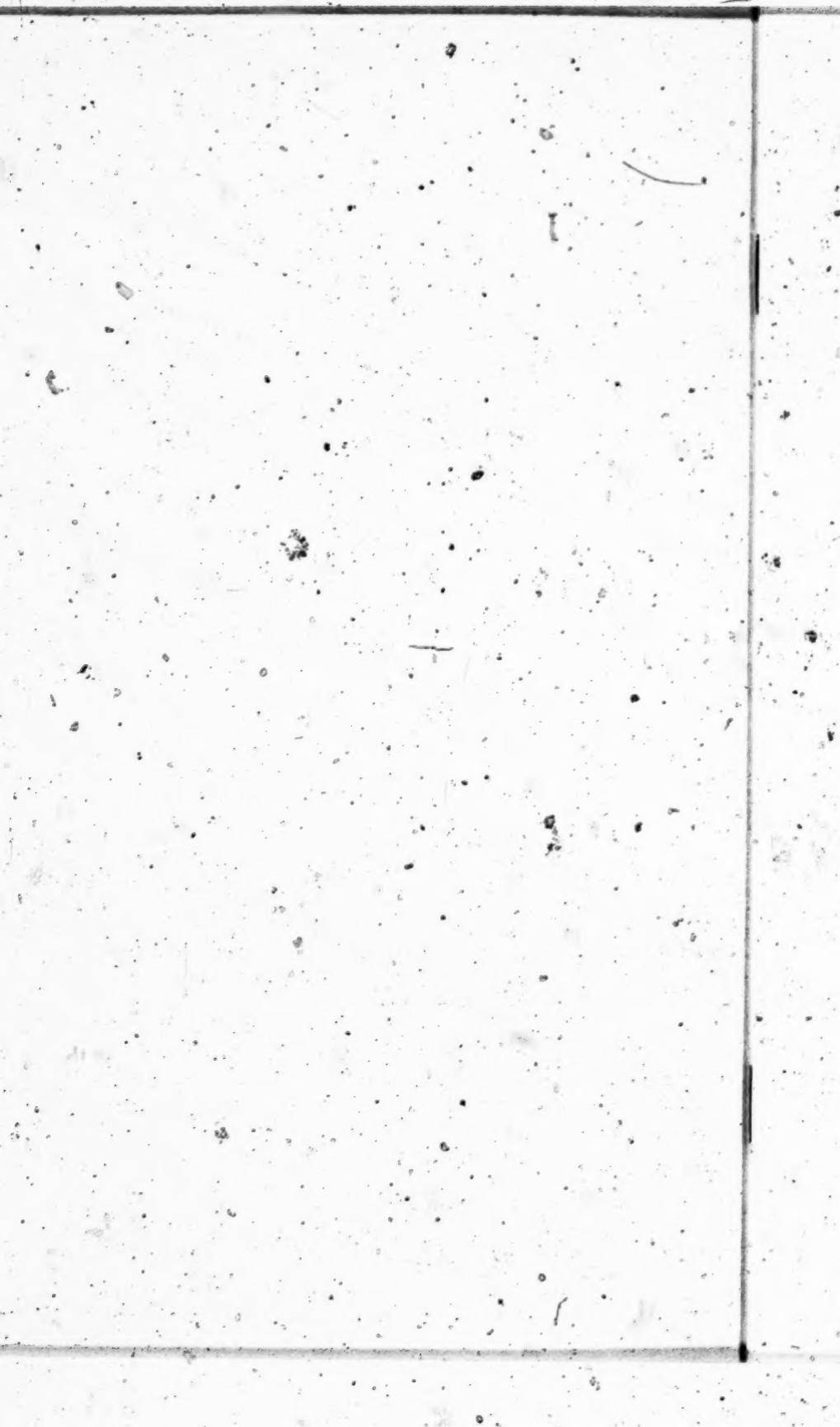
**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Motion has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above, this ~~14~~ day of September, 1967.

I FURTHER CERTIFY that copies of the above and foregoing Motion have been served upon Mr. Norman Dorsen, 40 Washington Square South, New York, New York 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above this ~~14~~ day of September, 1967..



WILLIAM A. PORTEOUS, JR.



Supreme Court of the United States

OCTOBER TERM, 1967.

No. 508

Office-Supreme Court, U.S.

FILED

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JOHN F. DAVIS, CLERK

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versus

**THE STATE OF LOUISIANA** through the **CHARITY**  
**HOSPITAL OF LOUISIANA** at **NEW ORLEANS**  
**BOARD OF ADMINISTRATORS** and **W. J. WING,**  
**M.D.**, and **A. B. C. INSURANCE COMPANIES.**

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BRIEF IN SUPPORT OF MOTION TO DISMISS  
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PORTEOUS & JOHNSON,  
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Baton Rouge, Louisiana.

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**SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1967**

---

No.

---

**THELMA LEVY, in her capacity as administratrix of the  
succession of LOUISE LEVY and as tutrix of and on  
behalf of the minor children of LOUISE LEVY, said  
children being: RONALD BELL, REGINA LEVY,  
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HOSPITAL OF LOUISIANA at NEW ORLEANS  
BOARD OF ADMINISTRATORS and W. J. WING,  
M.D., and A. B. C. INSURANCE COMPANIES.**

---

**Appeal from the Supreme Court of Louisiana.**

---

**BRIEF IN SUPPORT OF MOTION TO DISMISS  
AND/OR AFFIRM.**

---

**STATEMENT OF THE CASE.**

Appellants brought this action under Louisiana Civil Code Article 2315 alleging that they were the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appellees.

lants only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth Circuit, affirmed the judgment of the lower court and denied appellants a right or cause of action under Article 2315 because of their illegitimacy. Appellants then sought review in the Supreme Court of Louisiana and they were denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was sought.

### **ARGUMENT.**

**MAY IT PLEASE THE COURT:**

**I. THE APPEAL SHOULD BE DISMISSED SINCE AN INTERPRETATION OF A STATE STATUTE IS QUESTIONED ON CONSTITUTIONAL GROUND AND NOT THE CONSTITUTIONAL VALIDITY OF SAID STATUTE.**

Appellants herein are seeking recovery under the very same statute which they claim is unconstitutional. Appellants claim a right of action for wrongful death pursuant to Louisiana's wrongful death statute. Yet, appellants attack the constitutionality of the very statute under which they seek redress.

The arguments of the appellants are directed not at the constitutional validity of the statute but rather at the interpretation of the word "child" as used in the statute. Thus, the claims of appellants are claims grounded upon unconstitutional interpretation of the State statute. Appellants do not question the validity of the statute as such.

No appeal should lie from an alleged unconstitutional interpretation of an otherwise valid State statute. *Commercial Bank vs. Buckingham*, 46 U. S. 317, 5 How. 317, 12 L.Ed. 169 (1847). See also *Congdon, etc., Min. Co. vs. Goodman*, 67 U. S. 574, 2 Black 574, 17 L.Ed. 257 (1862); *Smith vs. Hunter*, 48 U. S. 738, 7 How. 738, 12 L.Ed. 894 (1849); *Scott vs. Jones*, 46 U. S. 343, 5 How. 343, 12 L.Ed. 181 (1847).

## II. ILLEGITIMATE CHILDREN HAVE NO RIGHT OR CAUSE OF ACTION UNDER ARTICLE 2315 OF THE LOUISIANA REVISED CIVIL CODE OF 1870.

### (a) A Right or Cause of Action for Wrongful Death Did Not Exist at Common Law or Civil Law and Is Solely a Creation of State Statutory Law and Must Be Construed Strictly.

The Common Law did not grant a right or cause of action for wrongful death. The Civil Law was to the same effect. *Panama R. Co. vs. Rock*, 266 U. S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). As a result, the right and cause of action for wrongful death is a creature of statute. According to Judge Dawkins of the Western District of Louisiana, "To begin with the cause of action under Article 2315—originally non-existent under civil or common law . . . was created by the Legislature in derogation of common or civil right. Therefore, as the Louisiana courts repeatedly have said, it must be narrowly, strictly construed . . . cause of action for wrongful death, created by Article 2315, is substantive, purely personal, and accrues only to the beneficiaries named, in the order

of their naming." *Bounds vs. T. L. James & Co.*, 124 F.Supp. 563, 567 (W.D. La., 1954).

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana. *Premeaux vs. Henry Ford & Son*, 155 La. 112, 98 So. 858 (1924); *Premeaux vs. Henry Ford & Son*, 155 La. 106, 98 So. 856 (1924); *Thaxton vs. Louisiana Ry. & Nav. Co.*, 153 La. 292, 95 So. 773 (1923); *Van Amburg vs. Vicksburg, S. & R.R. Co.*, 37 La. Ann. 650 (1885); *Hubgh vs. New Orleans & C. R. Co.*, 6 La. Ann. 495 (1851).

This statute governs all rights and causes of action for wrongful death and is to be construed *sui generis* and strictly. *Maher vs. Schlosser*, 144 So.2d 706 (La. App. 1962); *Young vs. McCullum*, 74 So.2d 339 (La. App. 1954); *Conrad vs. Citizens Cas. Co. of N.Y.*, 141 F.Supp. 166 (E.D. La. 1956); *Miller vs. American Mut. Liab. Ins. Co.*, 42 So.2d 328 (La. App. 1949); *Reed vs. Warren*, 172 La. 1082, 136 So. 59 (1931); *Kerner vs. Trans-Mississippi Terminal R.R.*, 158 La. 853; 104 So. 740 (1925); *Flash vs. Louisiana Western Ry. Co.*, 137 La. 352, 68 So. 636 (1915); *Chiners vs. Roger*, 50 La. Ann. 57, 23 So. 100 (1898).

Louisiana conferred the action for wrongful death and prescribed the terms upon which the action might be asserted. In this regard, a Pennsylvania court held:

"It must be remembered that at common law there was no right on the part of survivors to sue

for their father's or husband's death and they must now take the privilege upon the terms granted by the . . . legislature . . . and one of those terms is that the parties must be lawful children or a lawful widow. Petitioners have found no cases which give illegitimate children any right to recover in a death action and we believe there are none such." *Kemmerer vs. Reading Co.*, 64 Pa. D & C 433, 23 Leh. Co. L.J. 5 (1948).

**(b) Article 2315 Defines Rights In Terms of Status and Makes No Exceptions Based Upon Particular Factual Situations.**

The law creating the action for wrongful death and the right to assert that action speaks of its beneficiaries only in terms of status. It speaks of a "surviving spouse and child or children," the "surviving father and mother of the deceased" and the "surviving brothers and sisters of the deceased." Article 2315. The law does not attempt to make any distinctions based upon the loving father or mother and the less attentive parent, the loyal and disloyal child, the unfaithful and faithful wife, the unconcerned as opposed to the dedicated brother or sister. The law is blind to the personal qualities that may color and distinguish a relationship; it asks only that the relationship exist, and, therefore, the status.

(c) "Child" As Used in Article 2315 of The Revised Civil Code of 1870 Means Legitimate Child.

Speiser in his work *Wrongful Death* declares:

"Tiffany, in his pioneer treatise on wrongful death, comments that '(a) bastard is not a 'child,'' within Lord Campbell's Act.'

If there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death beneficiaries, refers to a legitimate child or to legitimate children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." Speiser, *Wrongful Death*, § 10.4, 537. See, also, 72 A.L.R. 2d 1235.

Louisiana's jurisprudence is replete with cases which indicate that "child" means legitimate child and that illegitimate children may not recover for the wrongful death of a parent. *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964); *Carter vs. Canal Ins. Co.*, 154 So.2d 476 (La.App. 1963); *Carter vs. Musso*, 151 So.2d 97 (La.App. 1963); *Scott vs. La Fontaine*, 148 So.2d 780 (La.App. 1963); *Buie vs. Hester*, 147 So.2d 733 (La.App. 1962); *Cheeks vs. Fidelity and*

*Casualty Co. of New York*, 87 So.2d 377 (La.App. 1956); *Jackson vs. Lindlom*, 84 So.2d 101 (La.App. 1956); *McConnell vs. Webb*, 226 La. 385, 76 So.2d 405 (1954); *Board of Port Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953); *Thompson vs. Vestal Lumber and Mfg. Co.*, 16 So.2d 594, aff'd. 22 So.2d 842 (La.App. 1944). It is well settled that a right of recovery in favor of a child or children under Article 2315 of the Civil Code is limited to a legitimate child or children. *Thompson vs. Vestal Lumber and Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1944); *Youchican v. Texas and Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Green vs. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Landry vs. American Creosote Wks.*, 119 La. 231, 43 So. 1016 (1907); *Lynch vs. Knoop*, 118 La. 611, 43 So. 252 (1907).

The strength of the requirement of legitimacy is evidenced by the fact that children of a putative marriage may not recover under Article 2315. Putative children must be legitimated. *Chivers vs. Couch Motor Lines*, *supra*; *Carter vs. Musso*, *supra*; *Buie vs. Hester*, *supra*; *Jackson vs. Lindlom*, *supra*.

It makes no difference that the illegitimate child was dependent upon the parent for support. *Board of Port Commissioners vs. City of New Orleans*, *supra*.

Acknowledgment will not serve to cure a defect in legitimacy. *Lynch vs. Knoop*, *supra*; *Scott vs. La Fontaine*, *supra*; *Cheeks vs. Fidelity and Casualty Co. of New York*, *supra*.

**(d) Louisiana Has Long Denied A Right Or Cause of Action To Illegitimates.**

The jurisprudence just cited goes back to 1907 when *Lynch vs. Knoop, supra*, was decided. Had the interpretation of Article 2315 by the courts as requiring legitimacy been incorrect, it only stands to reason that the Legislature of Louisiana would have seen fit to so alter the codal article as to permit a recovery. In *Abraham vs. Connecticut Fire Ins. Co.*, 177 So.2d 295, 302 (La.App. 1965), it was declared:

“The statute being *sui generis*, this court is not at liberty to question the wisdom of the legislature in confining, restricting and limiting the benefits of the law to those classes of relations expressly enumerated. Conceding the authority of the legislature to include illegitimate relations within the scope of the statute if that body so desires, it nevertheless remains it has not as yet seen fit to do so. We can only conclude, therefore, that the legislature did not intend to extend to illegitimate or natural brothers and sisters the initial right of survivorship of those actions as encompassed in subject statute.”

See, also, *Cheeks vs. Fidelity & Casualty Co. of N.Y.*, 87 So.2d 377 (La.App. 1956).

**(e) Because Louise Levy Treated Her Children As Though They Were Legitimate And Loved Them, There Exists No Basis For Making An Exception To The Rule of Legitimacy.**

The children on whose behalf this action was brought were concededly illegitimate. But it has been

argued that because their mother loved them and sacrificed for them and treated them as though they were legitimate, they should be admitted to that status to which legitimates are entitled, namely, a right and cause of action for wrongful death.

Undoubtedly many mothers have loved their illegitimate children, have sacrificed for them and have treated them as legitimate. But the quality of the relationship between parent and child should not be permitted to overcome the inadequacy of status. See, *Youchicon vs. Texas & Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920). As pointed out earlier: putative children may not recover, dependent illegitimate children may not recover and acknowledged children may not recover. Surely these putative, dependent and acknowledged children were loved by the parent, who sacrificed for the child and who treated the child as legitimate. But Louisiana has not granted exceptions in those cases and there exists no reason why it should do so in this case.

### **III. TO REFUSE TO ALLOW THESE APPELLANTS A RIGHT OF RECOVERY IS NOT VIOLATIVE OF THE DUE PROCESS OF LAW AND EQUAL PRO- TECTION OF THE LAWS REQUIREMENTS OF THE STATE AND FEDERAL CONSTITUTIONS.**

The mere denial of a right conferred by state law does not involve a denial of equal protection of the law; there must be an intention and purpose to discriminate shown, and the denial must be arbitrary. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.

2d 1485 (1957); *McGowan vs. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2nd Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs. Ryder*, 176 F.Supp. 90 (W.D. La. 1959); *W.M.C.A. vs. Simon*, 208 F.Supp. 368 (S.D. N.Y., 1962). The element of intentional or purposeful discrimination necessary to establish a denial of equal protection of the law is not presumed. *Snowden vs. Hughes*, 321 U.S. 1, 8, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). In *Snowden vs. Hughes*, *supra*, the Court said:

“The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination . . . But a discriminatory purpose is not presumed . . . there must be a showing of ‘clear and intentional discrimination’ . . .”

Appellants have shown no clear and intentional discrimination.

(a) **The Classification of Persons As Legitimate And Illegitimate Is Not Arbitrary, Unreasonable or Capricious And Is Related To The General Health, Welfare And Morals of The People of Louisiana.**

The essence of appellants' argument is against the requirement that beneficiaries under Article 2315

be legitimate. Appellants object to the classification of persons into legitimate persons and illegitimate persons. Appellants seemingly would want the class of persons entitled to recover to be broadened to include illegitimates, or to include a class of illegitimate who love their mothers and who are loved by their mothers, who sacrifice for them and treat them as legitimate.

But the classification which prevails is into legitimate and illegitimate: And this classification need only be reasonable and properly related to a legislative purpose. See, 16 Am. Jur. 2d 494, 495, 496, 497, 498.

In *Morey vs. Doud*, 354 U.S. 457, 463, 77 S.Ct. 1344, 1349, 1 L.Ed. 1485 the Court stated:

"The 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination' . . . The equal protection clause does not take from the State the power to classify . . . but admits of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."

The question arises as to whether the classification into legitimate and illegitimate is a reasonable

classification connected with a legitimate legislative purpose. The requirement of legitimacy has a number of deep policy roots.

The most often espoused reason for denying illegitimate rights conferred upon legitimates is seen in an argument based upon the general welfare and morality of a people. The state has an interest in the preservation of the family, in the promotion of the marital institution, in the discouragement of promiscuity and generally decadent morality.

Similarly, the system of those legal institutions, which are an outgrowth of family law, require that a system based on legitimacy of relationships prevail. To allow persons who may claim to be the illegitimate offspring of persons long since dead to claim legal rights would invite chaos where certainty is required. The problem of proof or disproof as the case might be would be insurmountable. The door to dishonest claims would be opened. Illegitimates could make claims and the evidence needed to disprove the claimed relationship would doubtlessly lie with the deceased.

Thus, the general morality and welfare and the security of legal institutions underlie the requirement of legitimacy, and, therefore, a classification of persons into legitimates and illegitimates is meritorious.

An argument as to the unconstitutionality of the distinction between persons as legitimate and illegiti-

mate was presented in *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F.Supp. 652 (W.D. La., 1965) at 653. Judge Putnam of the Western District of Louisiana declared:

"In addition to the argument as to the status of these minors plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not afford them an opportunity to sue for the wrongful death of their natural parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose."

The Court of Appeals for the Fifth Circuit passed upon the very issue raised in this matter in June of 1967 in *Gloni vs. American Guarantee and Liability Ins. Co., et al.*, No. 24181 (5th Cir. 1967). The case expressly declared that the classification of persons into legitimate and illegitimate for the purpose of Article 2315 of the Louisiana Civil Code was a reasonable legislative classification.

In the *Glona* case, a mother sued for the wrongful death of her son who was illegitimate but was informally recognized by her. Passing upon the issue of legitimacy, the Court declared:

"As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey vs. Doud*, 354 U. S. 456."

Finally, the classification into legitimates and illegitimates developed by the Louisiana courts in connection with its wrongful death statute should not be declared unreasonable and every presumption exists in favor of its reasonableness. *Morey vs. Doud*, *supra*. The wrongful death statutes of other States, workmen's compensation laws, inheritance laws, laws regarding support of minors, welfare legislation and a host of other laws, both Federal and State, have, throughout their history, often classified the rights of persons as dependent upon their legitimacy. It cannot be said that no reason existed for these classifications.

**CONCLUSION.**

For the reasons stated above, the appeal herein  
should be dismissed or the judgment below affirmed.

Respectfully submitted,

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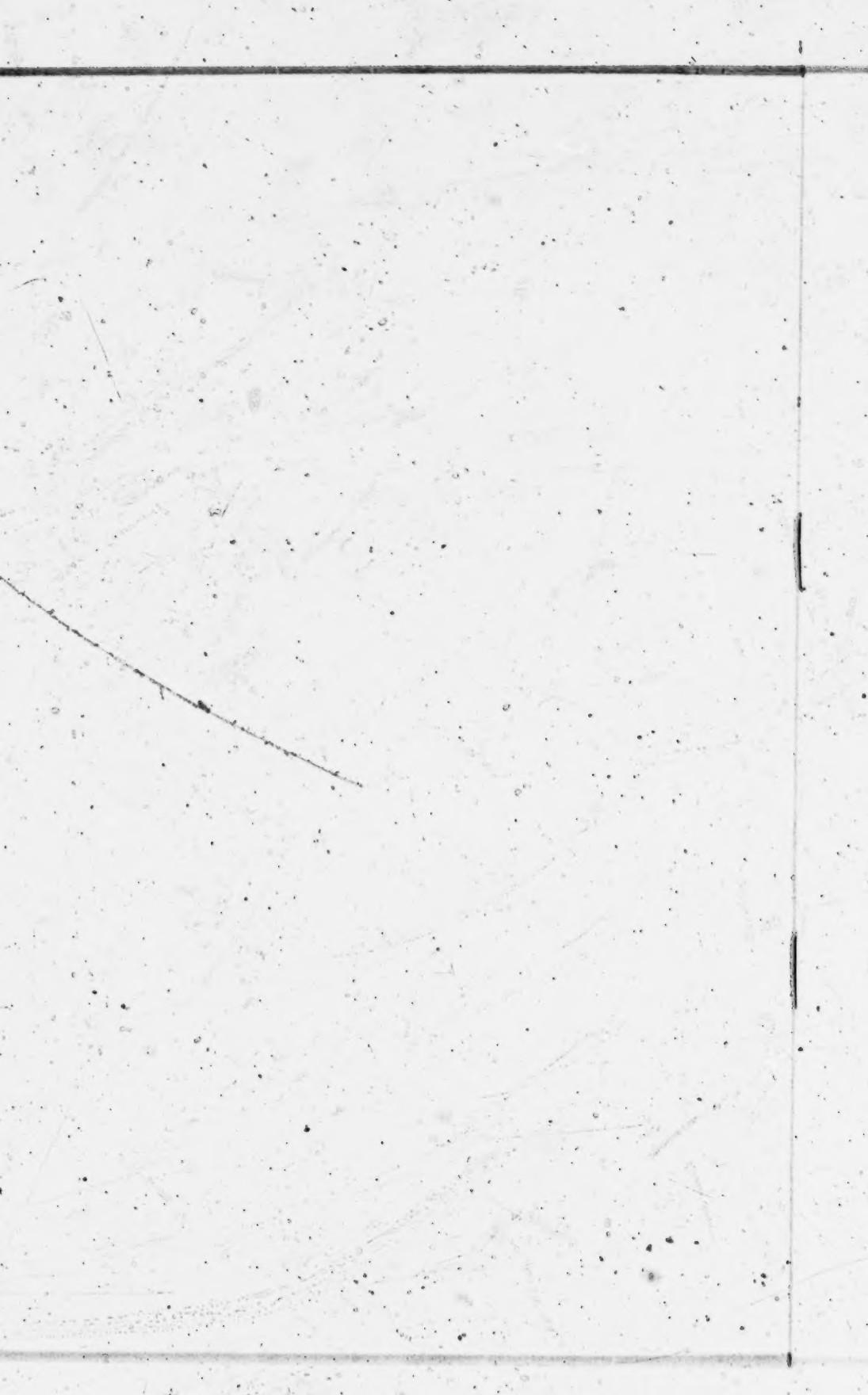
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**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of September, 1967.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York, 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York, 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this .... day of September, 1967.

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**WILLIAM A. PORTEOUS, JR.**



**SUPREME COURT, U. S.**

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1967

Office Supreme Court, U.S.

FILED

SEP 30 1967

States

JOHN F. DAVIS, CLERK

No. 508

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—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

**APPELLANT'S REPLY BRIEF**

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## APPELLANT'S REPLY BRIEF

There is no support for Section I of the Appellees' Brief in Support of Motion to Dismiss and/or Affirm. Appellant does not claim that Article 2315 of the Louisiana Civil Code is constitutionally incapable of authorizing recovery. The claim is rather that the statute is invalid for denying recovery in this action on the basis of an arbitrary classification. It is settled that the appellate jurisdiction of this Court extends to such a claim. E.g., *Griffin v. Illinois*, 351 U. S. 12 (1956).

Section II of Appellees' Brief, which deals only with questions of State law, is irrelevant to the claim made by Appellant under the Constitution of the United States.

Section III of Appellees' Brief does not respond to any of the contentions contained in the Jurisdictional Statement supporting the substantiality of the question presented in this case.<sup>1</sup> Its primary reliance on *Morey v. Doud*, 354 U. S. 457 (1957), is wholly misplaced. That case involved an economic regulatory statute. For thirty years this Court has adhered to the rule according States and the federal government the widest discretion in the power to classify under such statutes. As the Jurisdictional Statement makes clear (pp. 9-10), the principles of constitutional adjudication on which this rule rests are inapplicable to a statute, such as the one in issue, that determines legal rights on the basis of ancestry and blood relationship. E.g., *Korematsu v. United States*, 323 U. S. 214 (1944); *Oyama v. California*, 332 U. S. 633 (1948).

The two lower court decisions referred to in Appellees' Brief are neither apposite nor persuasive as to the merits of the question presented here. The District Court in *Benjamin v. Hardware Mutual Casualty Co.*, 244 F. Supp. 652, 653 (W. D. La. 1965), stated explicitly that "[Article 2315] is not under attack in this proceeding." The other case, *Glona v. American Guarantee & Liability Ins. Co.*, 379 F. 2d 545 (5th Cir. 1967), involved the question, plainly dis-

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<sup>1</sup> The only argument that approaches a contention on the merits is the suggestion at page 12 that a contrary decision in the present case "would invite chaos." The dispositive answer to this unsupported statement is that Louisiana is apparently the only State that denies illegitimate children the right to sue for the wrongful death of their mother, and "chaos" has not been visible in the other 49 jurisdictions. The reason is, of course, that problems of proof in maternity actions are virtually non-existent.

tinguishable in principle from the one presented here, of whether a *mother* could maintain an action under Article 2315 for the wrongful death of her illegitimate son. Denial of recovery to the mother involves neither the problem of economic dependence of child on mother that exists here nor the manifest inequity of punishing individuals—the illegitimate children—for the acts of others over whom they could have no control. In addition, neither *Benjamin* nor *Glona* is intrinsically persuasive because there is no attempt in either opinion to justify the conclusion or even explain the process by which the conclusion was reached.<sup>2</sup>

In precise terms the question presented in this case is whether a State can deny dependent children, on the sole ground that they are illegitimate, any right to recover in tort against those wrongfully responsible for the death of their mother. Louisiana is apparently the only jurisdiction that sanctions this result. In so doing, it punishes blameless individuals for the acts of others, does so without any empirical justification, and contravenes some of the most conspicuous decisions of this Court holding that a State can not validly classify individuals on the basis of their ancestry.

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<sup>2</sup> A Petition for Certiorari was filed in the *Glona* case on September 20, 1967: No. 639, 36 U. S. L. Week 3107 (September 26, 1967).

For these reasons a substantial question under the Constitution is presented in this case, and jurisdiction should be noted.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1967  
No. 508

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THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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**BRIEF FOR APPELLANT**

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**Opinions Below**

The denial of certiorari by the Supreme Court of Louisiana is reported at 250 La. 25, 193 So. 2d 530, and is set out at App. p. 64. The opinion of the Court of Appeal, Fourth Circuit, Parish of Orleans is reported at 192 So. 2d 193, and is set out at App. p. 61. The Civil Dis-

trict Court for the Parish of Orleans wrote no opinion; its decision is found in the judgment, dated January 31, 1966, set out at App. p. 47.

### **Jurisdiction**

Appellant filed a notice of appeal to this Court in the District Court and the Court of Appeal on April 19, 1967. On June 6, 1967, Hon. R. T. McBride of the Louisiana Court of Appeal, Fourth Circuit, enlarged Appellant's time to file the Jurisdictional Statement and to docket the appeal to and including August 16, 1967. The Jurisdictional Statement was filed on August 16, 1967, and probable jurisdiction was noted on November 6, 1967. Jurisdiction on appeal is conferred by 28 U. S. C. §1257(2).

### **Statute Involved**

Article 2315 of the Louisiana Civil Code:

“Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

“The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

“The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such

spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

(*As amended Acts 1960, No. 30, §1.*)

### The Question Presented

Whether Louisiana Civil Code Article 2315, as construed, and applied by the Supreme Court of Louisiana, is invalid under the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution because it denies a right of action to illegitimate children for the wrongful death of their mother, on whom they were dependent, solely because of their status as persons of illegitimate birth.

### Statement of the Case

Appellant brought this action under Article 2315 of the Louisiana Civil Code on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the A.B.C. Insurance Companies, later designated as the Interstate Fire and Casualty Company (App. pp. 5, 27).

Article 2315 combines the two traditional forms of statutes dealing with recovery after the wrongful death of an individual. It authorizes recovery for the damage to certain classes of plaintiffs incurred as a result of the death. Appellant, on behalf of the minor children, requested different amounts of damages depending on the age of each child, the total sought being \$60,000. The statute also provides for the survival of any cause of action which the decedent had at the time of death. The children here, as a group, claim \$5,000 for the decedent's pain and suffering.

The Third Supplemental and Amending Petition, whose allegations (as well as the allegations of the other portions of the Petition) must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (App. pp. 39-40).

As alleged in the Petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with

symptoms of tiredness, dizziness, weakness, chest pain and slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but he failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she was brought to the hospital in a comatose condition, and at that time an adequate examination resulted in the correct diagnosis of her illness as hypertension uremia. She died on March 29, 1964 (App. p. 8).

The defendants, including Dr. Wing and the Interstate Fire and Casualty Company, moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimate (App. pp. 23-24). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed<sup>1</sup> (App. pp. 47-48). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother. The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the

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<sup>1</sup> The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital were continued. No appeal was taken with respect to either of these parties. The judgment as to Dr. Wing and the Interstate Fire and Casualty Company was final in all respects.

Fourteenth Amendment (App. p. 62). Appellant petitioned the Supreme Court of Louisiana for a writ of certiorari on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (App. p. 64).

## ARGUMENT

### I.

**Article 2315, as applied to deny illegitimate children the right to sue for the wrongful death of their mother, is invalid under the Equal Protection Clause of the Fourteenth Amendment.**

#### A. *The Governing Standards*

This Court has employed two well established and related standards in determining questions under the Equal Protection Clause. The first looks to the characteristic or trait determining the classification and finds that some classifications are by their nature suspect, and may only be utilized if there "clearly appears . . . some overriding statutory purpose . . . ;" *McLaughlin v. Florida*, 379 U. S. 184, 192, or "compelling justification," *Oyama v. California*, 332 U. S. 633, 640; the second looks to the purpose of the statute and the basis of the classification and requires that the two be reasonably related.

The discrimination against the illegitimate children in this case is unconstitutional under both of these standards. Louisiana in Article 2315 in effect has created two classes of children—one that can sue for wrongful death and one that cannot. The classification, based on illegitimacy, is unrelated to the purpose of Article 2315 and is, moreover, by its nature a suspect criterion, the use of which

the State has utterly failed to justify.<sup>2</sup> The unreasonableness of the classification is accentuated by the fact that Louisiana is the only State that deprives illegitimate children of the right to sue for the wrongful death of their mother.<sup>3</sup>

In reference to the first standard, this Court has repeatedly affirmed that classifications based on race or ancestry are "constitutionally suspect," *Bolling v. Sharpe*, 347 U. S. 497, 499, and "subject . . . to the most rigid scrutiny," *Korematsu v. United States*, 323 U. S. 214, 216. According to BLACK'S LAW DICTIONARY (4th ed. 1951), illegitimacy is "The condition before the law or the social *status*, of a bastard; the state or condition of one whose parents were not intermarried at the time of his birth." (emphasis in original). It is obvious that a child's illegitimacy is like his race and ancestry and has nothing whatever to do with his own actions or conduct. As this Court said in *Hirabayashi v. United States*, 320 U. S. 81, 100, "Distinctions between citizens solely because of their ancestry are by

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<sup>2</sup> The varied forms of discrimination against illegitimates that exist in virtually every State are coming under increasing attack. See, e.g., Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477 (1967); Foote, LEVY AND SANDER, CASES ON FAMILY LAW 72-73 (1966); Foster and Freed, Unequal Protection: Poverty and Family Law, 42 Ind. L. J. 192 (1967); Krause, Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy, 44 Tex. L. Rev. 829 (1966).

But the constitutionality of other forms of discriminatory legislation is not presented here; the instant case offers the most egregious example of invidious discrimination against illegitimates.

<sup>3</sup> Despite some unsupported statements in secondary literature that other States deprive dependent illegitimate children of an equal right to sue for the wrongful death of their mother, Louisiana is in fact the only jurisdiction that does so, as far as we have been able to determine. Courts in Georgia and Maryland reached this result, but both cases have been overturned by statute. Ga. Code Ann. §105-1306; Md. Code Ann. Art. 67 §4. See Annotation, 72 A. L. R. 2d 1235, 1236-37 (1960).

their very nature odious to a free people whose institutions are founded upon the doctrine of equality."

Thus, attacks upon classifications based on illegitimacy "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs v. Cooper*, 336 U. S. 77, 95 (Frankfurter, J., concurring). There is no room for the State to claim that the discrimination here should be sustained if there is any "rational basis" to support it. Accordingly, there should be no constitutional distinction between discrimination based on illegitimacy and that based on race; discrimination against illegitimate also should be "constitutionally suspect."<sup>4</sup> This is all the more true because statutes directed against illegitimate tend to fall most heavily on Negroes,<sup>5</sup> as in this case, and in some

<sup>4</sup> As stated by a leading writer on illegitimacy in discussing the appropriate constitutional test, "It would seem to be beyond question that a child's right to a familial relationship with his father is more akin to a 'fundamental right and liberty' or a 'basic civil right of man' than to a mere economic interest." Krause, Equal Protection for the Illegitimate, *supra* n. 2, at 488. If this is true of a child's relationship with his father, it is all the more obvious with respect to the relationship with his mother.

<sup>5</sup> In Louisiana in 1964 a total of 9,567 illegitimate children were born. Of these 8,441 were Negro and 1,126 were white. The ratios of 1964 and other selected years were as follows:

*Ratios of Illegitimate Births  
per 1000 Live Births in Louisiana*

	Total	White	Non-White
1950	78.8	12.4	175.1
1957	82.1	13.1	190.4
1964	111.2	21.7	245.5

Figures taken from: Illegitimate Births: United States, 1938-1957, Vital Statistics—Special Reports, Selected Studies, Vol. 47, No. 8, Sept. 30, 1960 (Department of H. E. W., Public Health Service, National Office of Vital Statistics), table 1, p. 249; Report of the Division of Public Health, p. 21, Louisiana State Board of Health (1964).

instances may have been designed to achieve this end. See W. BELL, AID TO DEPENDENT CHILDREN, 181-86 (1965).<sup>6</sup>

The second constitutional standard—a reasonable relationship between classification and purpose—was stated as early as 1896 in *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 155:

"[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

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<sup>6</sup> In 1960 as part of a large anti-integration package passed at an emergency session of the legislature, N. Y. Times, Aug. 28, 1960, p. 62, col. 4, Louisiana instituted new measures to penalize illegitimate children and their parents. "Giving birth to two or more illegitimate children" was declared to be a crime as to both the father and the mother. LRS-R.S. 14:79.2 (1965).

Another statute provided that categorical assistance under the Social Security Act could not be given to a family if the mother had an illegitimate child after receiving assistance. La. Acts 1960, No. 306, §1. Under this "suitable home" plan 6,000 families with 22,500 children removed from public welfare. 95% of those affected were Negroes, although 66% of the welfare caseload a few months earlier was Negro. W. BELL, AID TO DEPENDENT CHILDREN, 183 (1965). Such "suitable home" requirements were prohibited in a major statement by Arthur J. Flemming, Secretary of the Department of Health, Education and Welfare. State Letter No. 452 (U. S. Bureau of Public Assistance), Jan. 17, 1961. Congress subsequently endorsed this interpretation of the Social Security Act. 42 U. S. C. 604(b), Title IV, §404(b).

Historically, the children of slaves were all deemed to be illegitimate. See H. CATTERALL, JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO (1932). Marriages between whites or Indians and Negroes were long prohibited in Louisiana and the illegitimate children of miscegenous unions, like incestuous or adulterous illegitimates, could not be legitimated by subsequent marriage or by formal acknowledgment. *Hibberf v. Mudd*, 187 So. 2d 503 (La. App. 1966).

This standard has consistently been adhered to by the Court. As stated in *McLaughlin v. Florida*, 379 U. S. 184, 193, the question is "whether the classifications drawn in a statute are reasonable in light of its purpose . . ." Or, as laid down in *Traux v. Raich*, 239 U. S. 33, 42, "reasonable classification implies action consistent with the legitimate interests of the State . . ." See also *Carrington v. Rash*, 380 U. S. 89, 93.

While the Equal Protection Clause does not always require an exact correspondence between the purpose sought to be achieved and the class encompassed by the statute, here there is a complete lack of reasonable relation between the two. Judging Article 2315 in light of its purpose and the appropriate constitutional standard, it is plain that it is "arbitrary" and not a "reasonable classification" to deprive children of a cause of action for the negligent death of their mother on the sole ground that they are illegitimate.

#### **B. The Claim for Wrongful Death**

The purpose of wrongful death statutes, deriving from Lord Campbell's Act, 9 & 10 Vict. Ch. 93 (1846), is to reimburse those who stand to lose through the death of another, usually a close relative, whether through contributions based on past earnings or through loss of services, training, nurture, education and guidance. See S. SPEISER, RECOVERY FOR WRONGFUL DEATH, iii-iv, 12-13 (1967). In ruling that illegitimate children could sue under the Federal Death Act, the Court of Appeals for the Second Circuit said:

"The purpose and object of the statute is to continue the support of dependents after a casualty. To hold that these children or the parents do not come within

the terms of the act would be to defeat the purposes of the act. The benefit conferred beyond being for such beneficiaries is for society's welfare in making provision for the support of those who might otherwise become dependent."

*Middleton v. Luckenbach S.S. Co.*, 70 F. 2d 326, 329-30 (1934), quoted in *DeSylva v. Ballantine*, 351 U. S. 570, 583-84 (Douglas, J., concurring). Consistently with this policy, the children in the present case would not be denied recovery under other federal statutes because of their illegitimacy.<sup>7</sup>

Louisiana's wrongful death statute was an "adoption" of Lord Campbell's Act, *Cooper v. Blanck*, 39 So. 2d 352, 359 (La. App. 1923), and its traditional compensatory purpose was early set forth by the Supreme Court of Louisiana:

"the object of this law was to save [children] harmless during their minority from the loss of benefits (ma-

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<sup>7</sup> Both the Veterans Administration Act, 38 U. S. C. §101 (1964) and Social Security Act, 42 U. S. C. §§301 *et seq.* allow illegitimate to recover when there is satisfactory proof of paternity. Under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1427 (1927), 33 U. S. C. §§901-950 (1964), recovery is allowed by illegitimate children who are acknowledged by and dependent upon the deceased. Cases under the Jones Act, 38 Stat. 1185 (1910), as amended, 46 U. S. C. §688 (1964), also hold as a matter of federal law that the term "children" includes illegitimates. *Civil v. Waterman S.S. Corp.*, 217 F. 2d 94 (2d Cir. 1954). The Federal Employees' Liability Act, 35 Stat. 65 (1908), as amended, 5 U. S. C. §2093 (1964), the Copyright Act, 17 U. S. C. §24 (1964), and the Federal Employees' Group Life Insurance Act, 68 Stat. 738 (1954), as amended, 5 U. S. C. §2093 (1964), all incorporate state law of inheritance and in this case the children would be allowed to recover through their mother. L.S.A.-C.C. Article 918. See generally Note, The Rights of Illegitimate Under Federal Statutes, 76 Harv. L. Rev. 337 (1962).

terial and moral) which they would have received had their father lived up to the time of their respective majorities." *Eichorn v. New Orleans & C. R. Light & P. Co.*, 114 La. 712, 724, 38 So. 526, 530 (1904).

The purposes of death statutes in general, and of Louisiana's in particular, are wholly consistent with the claim of the children here. They were as close to their mother as any children born in wedlock could be. They were fully dependent on her for the necessities of life, as well as the vital intangibles of training, nurture, and guidance. And they are now losing as much as—indeed, because of the absence of a father, probably more than—legitimate children would lose in comparable circumstances. To lose sight of these facts is not only to ignore the object of actions for wrongful death, but to treat these illegitimate children as "constitutional nonpersons," devoid of the equal protection of the laws. See Fortas, *Equal Rights—For Whom?*, 42 N. Y. U. L. Rev. 401, 408 (1967); see also Note, 30 Yale L. J. 167 (1920) (sharply critical of early case holding that illegitimate children could not recover for wrongful death of their parent).

The unreasonableness of the classification here in light of the statutory purpose becomes even plainer when it is recognized that in Louisiana both parents are under a legal duty to support their illegitimate children. LRS-C.C. Article 240. Article 239 of the Civil Code provides the rationale for this rule: "[N]ature and humanity establish certain reciprocal duties between fathers and mothers and their illegitimate children . . ." In this context of a state policy requiring parents to support their out-of-wedlock children, it is surely bizarre to deny them a cause of action

against a wrongdoer who caused the death of their mother, on whom they were dependent.<sup>8</sup>

The invalid application of Article 2315 is pointed up further by a recent decision of a three-judge District Court of the Middle District of Alabama. In *Smith v. King* (Civ. No. 2495-N, Nov. 8, 1967), the court invalidated the "substitute father" regulation of the Alabama Department of Pensions and Security, under which public assistance payments known as Aid to Families with Dependent Children were to be terminated if a man lived out of wedlock in their home or had sexual relations with their mother. The District Court held this a denial of the equal protection of the laws because under the Alabama regulation financial assistance is

"denied for an arbitrary reason—the alleged sexual behavior of the mother; such a reason is wholly unrelated to any purpose of the Aid to Dependent Children statutes . . . . The punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation." Mimeo-graph opinion, pp. 10-11.

The *Smith* case is directly in point here because in both cases, for reasons "wholly unrelated" to the purpose of state legislation, benefits under the statutes have been denied on

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<sup>8</sup>The arbitrary nature of the classification here is further accentuated by the fact that Article 2315 provides that *adopted* children may recover for the death of their parents, and because Louisiana courts even allow employers to recover from a wrongdoer workmen's compensation payments that they make to the deceased's illegitimate children. *Board of Com'r's v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lumber Co. of Mansfield, Inc.*, 201 So. 2d 357 (La. App. 1967).

the ground of illegitimacy.<sup>9</sup> The present case is a much stronger instance of a denial of equal protection of the laws than the *Smith* case because there not only the illegitimate children were denied benefits, but the entire family—including the mother who was “responsible” for the illegitimacy—while here only the illegitimate children are being denied the right to sue. Moreover, in *Smith* there was not the additional inequity, present here, that denial of recovery permits a wrongdoer to escape any consequences for his act.

The arbitrary character of the ruling below is clarified by its attempted justification in the Louisiana courts. The Supreme Court of Louisiana wrote no opinion, and the sole justification given by the Court of Appeal for interpreting Article 2315 to discriminate against illegitimates was that “it discourages bringing children into the world out of wedlock.” App. p. 62. But the Court cited no evidence to support the reasonableness of this means of controlling illegitimate births.

Moreover, the attempted justification of the Louisiana court is offensive to common sense. It would be truly remarkable if persons contemplating or in the process of producing a child out-of-wedlock would be deterred by the possibility that the child would not be able to recover for their wrongful death. Surely, such a fanciful assertion, which is at the root of the decisions below, will not suffice to justify the denial of rights conferred by Article 2315 to children who have lost their mother through another’s wrongful conduct.

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<sup>9</sup> In an analogous area, two courts have recently held that the denial to a wife of the right to sue for loss of consortium of her husband, when the husband may sue for loss of the consortium of his wife, violates the wife’s right to equal protection of the laws. See *Owens v. Illinois Baking Corp.*, 260 F. Supp. 820 (W. D. Mich. 1966); *Clem v. Brown*, 207 N. E. 2d 398 (Ohio Ct. of Common Pleas, 1965).

Nor can Louisiana carry its heavy burden of proof by relying on other possible reasons for discriminating against illegitimate children. One argument, sometimes relied on to justify the exercise of state police power in this general area, is the asserted right of a State to regulate sexual activity, and specifically to discourage promiscuity. But as with illegitimacy, neither common sense nor practical experience supports the assumption that discrimination against illegitimate children under Article 2315 will deter illicit sexual activity.

Another possible argument would rely on the promotion of family unity. This policy is usually asserted to protect the interests of a parent's legitimate children against the claims of the illegitimate ones. See Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev. 477, 493 (1967). But in this case there are no legitimate children who stand to lose. Moreover, there is every reason to believe that "family unity" will be harmed rather than aided by disqualifying the illegitimate children here from maintaining an action to recover for the wrongful death of their mother. If the children do not recover in this action, they are likely to be split up in different homes or sent to an orphanage, with disastrous consequences for "family unity." If they do receive some money, it is at least possible that arrangements could be made to provide a home for all of them with an aunt, other relative or friend.

In sum, there is no substantial basis on which the decision below can be justified. This fact would be sufficient to invalidate the present application of Article 2315 wherever the burden of proof lies. Under the appropriate standard, which requires the State to demonstrate some "compelling justification" for this discrimination against the illegitimate

children, *Oyama v. California, supra*, unconstitutionality is the only possible conclusion.

### C. The Survivorship Claim

In addition to authorizing a claim for wrongful death, Article 2315 makes the right to recover damages caused by "an offense or quasi-offense" survive the death of the injured person for one year in favor of certain classes of persons, including the deceased's "child or children." The Louisiana courts also rejected the plaintiff's claim based on survivorship because the children were illegitimate.

As in the case of the claim for wrongful death, there is no valid basis for this result. This aspect of the discrimination against the illegitimate children also must be tested by whether it is reasonably related to the purpose of the statute, bearing in mind that the "suspect" characteristic determining the classification requires the State to demonstrate "some overriding statutory purpose . . ." to justify its action. *McLaughlin v. Florida, supra*, 379 U. S. at 190-92.

A central purpose of the survivorship portion of Article 2315 is to reinforce the deterrent aspects of the general tort law by refusing to permit a wrongdoer to escape payment of damages through the death of his victim. This purpose is expressed in the introductory sentence of the Article, which provides that "Every act whatever of man that causes damages to another obliges him by whose fault it happened to repair it," and it is explained in Note, 14 Tulane L. Rev. 612, 619 (1940), where it is said: "[T]he idea apparently evolved that the person responsible for the wrongful act should pay damages to someone connected with the deceased, whether or not that person was dependent on him."

This Louisiana policy is reflected in the cases that require a wrongdoer to pay damages to the employer of the deceased, even though the employer is not mentioned in Article 2315, to compensate him for payments made to the deceased's illegitimate children. *Board of Com'rs v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lumber Co. of Mansfield, Inc.*, 201 So. 2d 357 (La. App. 1967).

It is obvious that to deny illegitimate children the right to recover on their survivorship claim when legitimate children could recover is inconsistent with the express purpose of Article 2315. There is no reason why they should not be allowed to call to account the "person responsible" for their mother's death equally with legitimate children. Moreover, as with the wrongful death claim, there is no support of either a factual or common sense nature for the conclusion that individuals will be deterred from having illegitimate children or from engaging in illicit sexual activity by a law barring illegitimates from recovering by way of survivorship for damages incurred by the deceased before he died.

The only argument that might be made here that has not already been answered in connection with wrongful death is that to permit recovery could prejudice the claim of any legitimate children. This argument would be based on the fact that the total amount of the survivorship claim—the pain and suffering of the deceased, valued at \$5,000 in the complaint—is fixed and would not depend on the number of children.

But this contention—which the Louisiana courts did not rely on below—is without real substance. In the first place, there are no legitimate children involved in this case.

Second, if there were legitimate children, this argument would be questionable even with respect to a survivorship claim from a *father* of illegitimate children who has acknowledged the children. As of 1960, in 21 States illegitimates could inherit from their father. See Note, Illegitimacy, 26 Brooklyn L. Rev. 45, 76-79 (1959), and it has been persuasively argued that this result is constitutionally required. See Krause, Equal Protection for the Illegitimate, 65 Mich. L. Rev., *supra*, at 495-502. Whatever the result with regard to fathers, the argument against recovery is without any force whatever as to mothers of illegitimate children, with whom, as in this case, they will usually have a more intimate relationship. Finally, while there may be an issue of proof of paternity in some cases, see FOOTE, LEVY & SANDER, CASES AND MATERIALS ON FAMILY LAW 61-65 (1966), this difficulty is wholly absent in connection with maternity, where public records are invariably available.

Recognizing these considerations, 48 States and the District of Columbia have accorded illegitimates equal inheritance rights from their mothers. See Note, Illegitimacy, 26 Brooklyn L. Rev., *supra*, at 76-79 (New York and Louisiana the only exceptions). Even Louisiana has gone so far as to permit illegitimates to inherit from their mother if they are acknowledged (however informally) and there are no legitimate children. Louisiana Civil Code Article 918. *Allen v. Anderson*, 55 So. 2d 596 (La. App. 1951); *Succession of Tyson*, 186 La. 516, 172 So. 772 (1937). This situation further emphasizes the irrational nature of the discrimination here because, under Louisiana law, if the deceased mother of the children had collected damages for pain and suffering from the wrongdoer before her death, the illegitimate children would have lawfully inherited this money.

In this light, it is plain that the refusal of the courts below to permit recovery of the survivorship claim is not grounded in any reasonable relationship between illegitimacy and the purpose of Article 2315, but is rather an arbitrary and invidious classification and therefore invalid under the Equal Protection Clause.

## II.

**The discrimination imposed against the illegitimate children in this case violates the Due Process Clause of the Fourteenth Amendment because it furthers no valid state purpose and it deprives them of rights on the basis of status over which they have no control.**

We have already shown in Point I that the relationship between discrimination against illegitimates and any proper state purpose is baseless, and that Louisiana has violated the Equal Protection Clause by discriminating against illegitimate children under Article 2315. There is also a violation of due process because the State has arbitrarily barred certain children from suing for their mother's wrongful death and state imposition of disabilities "on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause." *Schware v. Bd. of Bar Examiners*, 353 U. S. 232, 249 (Frankfurter, J., concurring).<sup>10</sup>

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<sup>10</sup> While "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought," *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488, Article 2315 is not such a law, but is rather akin to statutes involving an aspect of personal liberty. As to such statutes, the Court has required a showing under the Due Process Clause that some

Furthermore, the decision below is violative of the children's due process rights because it denies them rights on the basis of a condition of birth and a status over which they had no control and which they are powerless to correct. This Court has recognized in several contexts that it is impermissible to hold an individual responsible for his status or conduct over which he has no control.<sup>11</sup> *Robinson v. California*, 370 U. S. 660, involved a California statute making it a misdemeanor for any person to "be addicted to the use of narcotics." The Court ruled that the "status" of narcotics addiction is "an illness which may be contracted innocently or involuntarily," and that therefore any punishment for the condition is invalid as "cruel and unusual" under the Eighth and Fourteenth Amendments. Or, as Justice Harlan said in his concurring opinion, to subject an individual to criminal penalty for a condition which he could not control is an "arbitrary imposition" by the State. 370 U. S. at 679. See also *Driver v. Hinnant*, 356 F. 2d 761 (4th Cir. 1966) ("chronic alcoholism" a disease not punishable as a crime).

A recent article, after discussing the many scholarly reviews of the *Robinson* opinion, concludes that, "Even the narrowest of these interpretations [supports] the notion

proper state purpose is being pursued through reasonable means. See, e.g., *Meyer v. Nebraska*, 262 U. S. 390; *Pierce v. Society of Sisters*, 268 U. S. 510; *Griswold v. Connecticut*, 381 U. S. 479; *Poe v. Ullman*, 367 U. S. 497, 543 (Harlan, J., dissenting). This requirement is consistent with the Court's statement in *Bolling v. Sharpe, supra*, 347 U. S. at 499, that "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . ."

<sup>11</sup> A leading legal philosopher, Professor Lon Fuller, maintains that a rule which an individual has no opportunity to obey is not a law at all but an arbitrary application of governmental force. L. FULLER, THE MORALITY OF LAW, 39, 70-73 (1964).

that punishing a status involuntarily entered into and which cannot voluntarily be abandoned is unconstitutional." Amsterdam, Federal Constitutional Restrictions on the Punishment of Crimes of Status; Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like, 3 Crim. L. Bull. 205 (1967). This precisely describes the status of the children here, who neither control nor can correct their condition of illegitimacy.<sup>12</sup>

*NAACP v. Overstreet*, 384 U. S. 118, is also on point. In this case the Court dismissed as improvidently granted a petition for certiorari which earlier had been granted, limited to the question whether the lower court, by holding the NAACP liable "for acts performed without its knowledge and by persons beyond its control," denied it rights secured by the Fourteenth Amendment. 382 U. S. 937. Although a majority of the Court voted to dismiss the petition, thereby expressing no opinion on the merits, four Justices through an opinion of Justice Douglas concluded that it violated the Fourteenth Amendment to hold the NAACP liable for acts over which it had no control. *Id.*, 384 U. S. at 123-26.

*Oyama v. California, supra*, brings us even closer to the instant case. There the Court struck down California's Alien Land Law that inflicted harm on a child due to the status of his father. In holding that extraordinary procedural burdens could not be imposed on a citizen in proving the ownership of land merely because his father was an

<sup>12</sup> See also the recent decision of the New York Court of Appeals holding that a vagrancy statute violates due process because it penalizes "a condition, such as one resulting from illness, over which an individual had no control." *Fenster v. Leary*, 20 N. Y. 2d 309, 314, \_\_\_\_ N. E. 2d \_\_\_\_ (1967). Two other courts have reached the same result. *Baker v. Bindner*, C. A. No. 5648, W. D. Ky., Oct. 13, 1967; *Alegata v. Commonwealth*, 36 U. S. L. W. 2324 (Mass. Sup. Jud. Ct., Nov. \_\_\_, 1967).

alien ineligible for citizenship, the Court reiterated that distinctions based on ancestry are "by their very nature odious to a free people." *Id.*, 332 U. S. at 646.

The unreasonableness of imposing burdens upon children because of the actions of their parents is exemplified by an explicit constitutional policy. Article III, Section 3, Cl. 2 of the Constitution provides that "The Congress shall have power to declare the Punishment of Treason, but no Attainer of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." While this provision applies in terms only to cases of treason (which had largely occasioned the historic use of corruption of blood in England), it manifests a broader principle of justice—that individuals should not be denied rights because of the behavior of their ancestors which they could not control.<sup>13</sup> In fact, what Louisiana has done here is similar to the medieval form of punishment by which a "felon's blood was attainted or corrupted" with the result that he could not own property himself, "nor could any heir born before or after the felony claim through him." W. S. HOLDSWORTH, 3 HISTORY OF ENGLISH LAW 69. Indeed, if corruption of blood is explicitly forbidden by the Constitution with respect to the heinous crime of treason, it certainly should not be permitted in lesser contexts. In this connection, see 18 U. S. C. §3563 (1948), which provides generally that "no conviction or judgment shall work corruption of blood or forfeiture".

In sum, as the only State that sanctions the cruel result of the ruling below, Louisiana not only has acted unreasonably in light of the purpose of Article 2315, but it has denied

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<sup>13</sup> The Louisiana statute also contravenes the biblical injunction that "The son shall not bear the iniquity of the father." Ezekiel 18:20.

rights to blameless individuals for the acts of others without any factual or other adequate justification and it has flouted some of the most conspicuous decisions of this Court holding that a State cannot harm individuals on the basis of their ancestry. Such action by Louisiana is obviously arbitrary and therefore inconsistent with the Due Process Clause of the Fourteenth Amendment.

### CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

DEC 26 1967

Supreme Court of the United States

October Term, 1967

No. 508

THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M. D. and A. B. C. INSURANCE COMPANIES.

On Appeal from the Supreme Court of Louisiana

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BRIEF OF THE EXECUTIVE COUNCIL OF THE EPISCOPAL CHURCH IN THE U. S. A. AND THE AMERICAN JEWISH CONGRESS, *AMICI CURIAE*

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IN THE

# Supreme Court of the United States

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No. 508

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THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M. D. and A. B. C. INSURANCE COMPANIES.

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On Appeal from the Supreme Court of Louisiana

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BRIEF OF THE EXECUTIVE COUNCIL OF THE EPISCOPAL CHURCH IN THE U. S. A. AND THE AMERICAN JEWISH CONGRESS, *AMICI CURIAE*

This brief *amici curiae* is submitted with the consent of the parties.

## Statement of the Case

This is a suit brought in behalf of five infant children of the decedent, a female domestic, who allegedly died by reason of the negligence of the defendant physician and the Charity Hospital of Louisiana at New Orleans. The action was brought under Louisiana Civil Code Article 2315,

which allows an action to be brought by children to recover for the wrongful death of their parent and declares that this right of action constitutes a "property right." The Louisiana courts held, however, that the term "child or children" as used in the statute contemplates only legitimate children and that, since the decedent's children were admittedly illegitimate and had never been legitimated, they could not sue under the statute.

### **Interest of the Amici**

The Executive Council of the Episcopal Church in the United States of America is the administrative organ of the Protestant Episcopal Church in the United States of America. It is also the policy-making organ of the Church between the triennial sessions of the Episcopal Church's General Convention. In this double capacity the Executive Council represents 89 continental dioceses and 3,500,000 communicants. Its President is the Presiding Bishop of the Episcopal Church in the U.S.A.

The Department of Christian Social Relations which is a part of the Executive Council and is, in this instance, acting for the Executive Council, is charged with supervision of community services, citizenship programs, pastoral services and material and programs at home and overseas. It is charged with representing the Church in public action which will assure the dignity of persons and assist communities to collaborate in the task of protecting the rights of citizens and the achievement of a society of justice.

The American Jewish Congress is a national organization of American Jews formed in part to protect the religious, civil, political and economic rights of Jews and to promote the principles of democracy. We are convinced that the surest way to preserve our nation and our democracy is to guard jealously the liberties secured by our Constitution and Bill of Rights and to oppose any infringements upon those liberties not clearly necessitated by overriding interests.

Each of these organizations has become increasingly concerned with the deepening gulf between the great majority of Americans who enjoy the benefits of our unparalleled affluence and the minority who have been denied the opportunity to share in our abundance. That gap is in many ways deepened by legislation based on outmoded concepts of caste and status, exemplified by the Louisiana statute here challenged. We believe that the discrimination embodied in that statute is unacceptable and unconstitutional for much the same reasons that this Court has condemned discrimination based on race and other accidents of birth. We believe further that legislation of this kind stands in the way of dealing with the pressing problem of poverty in the midst of plenty in a manner consistent with the principles of our democratic system.

## The Question Presented

The question presented on this appeal is whether a state may, consistently with the Fourteenth Amendment, exclude children born to an unmarried mother from the benefits of a statute permitting children generally to sue for the wrongful death of their mother.

## Summary of Argument

Exclusion of children born illegitimately from the benefits of a wrongful death statute deprives them of their property without due process of law since it is arbitrary and bears no rational relationship to any end which the state may lawfully pursue. It similarly deprives them of their liberty, a term which should be construed to include the right to be considered a full and equal member of the community, because it imposes cruel punishment upon persons who have committed no crime. Such exclusion deprives the children of the equal protection of the laws since the classification of the statute is arbitrary and irrational and not merely perpetuates but reinforces invidious distinctions and a badge of inferiority.

## ARGUMENT

### POINT I

**Exclusion of children of an unmarried mother from the benefits of a wrongful death statute deprives them of their property and liberty without due process of law.**

#### A. Due Process and Equal Protection

Preliminarily, we note that, although this Court pointed out in *Bolling v. Sharpe*, 347 U. S. 497, 499 (1954) that "equal protection" and "due process" are not necessarily interchangeable since the former is a "more explicit safeguard of prohibited unfairness," nevertheless discrimination may be "so unjustifiable as to be violative of due process." See also, *Schneider v. Rusk*, 377 U. S. 163, 168 (1964). In the present case, the discrimination clearly falls within that categorization. Hence, what we assert in Point I is in large measure applicable to our second Point and vice versa. However, for the sake of convenience we present our views separately under "due process" and "equal protection."

#### B. Deprivation of Property

In view of the universality of death actions among the states today, it may well be argued that, even though the common law did not recognize such suits, modern standards of law and justice create a property right in dependent children to recover damages against one who has wrongfully caused the death of their parent. In the present case, we need not go that far. The statute under which the present

suit has been brought is framed in language which indicates clearly that its purpose is to make the right to sue for personal injuries a property right which survives the death of the injured person and to extend this property right to encompass injuries which result in his death. In the present case, if the injuries caused the children's mother had not been fatal but she had died before instituting suit, the statute states expressly that her right of action would be a property right which her children could pursue. Exclusion of non-legitimate children from bringing (or continuing) such an action would clearly be depriving them of a property right. The statute declares that fatal injuries shall be deemed the same as non-fatal ones and that the right of action for causing death shall be deemed a property right to the same extent as one causing non-fatal injuries. Hence, exclusion of children of an unwed mother from the right to sue for her death is likewise a deprivation of a property right.

We submit that the deprivation is without due process of law in violation of the Fourteenth Amendment. We recognize that this Court will be extremely reluctant to strike down a state statute as violative of due process where only property rights are involved. It will not sit as a "super-legislature to weigh the wisdom of legislation." *Ferguson v. Skrupa*, 372 U. S. 726, 731 (1963). But the frame of reference of that decision is indicated by the illustrations given by the Court of legislation which had in earlier times been set aside as violative of due process—"laws prescribing maximum hours for work in bakeries \* \* \*, outlawing 'yellow dog' contracts, \* \* \* setting minimum wages for women \* \* \* and fixing the weight of loaves of bread \* \* \*"

(372 U. S. at 729, citations omitted). It is indicated, too, by the statement in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955) that "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

This is clearly not the type of legislation—or judicial interpretation of legislation—involved in the present suit. The legislation here in issue is aimed not at the regulation of "business or industrial conditions" but at the right of children to sue for the wrongful death of their parent. There is no indication that the Court intended *Ferguson v. Skrupa* to read the word "property" out of the Fifth and Fourteenth Amendments. (Cf. *Treichler v. Wisconsin*, 338 U. S. 251 (1949). It was held in *Barron v. Baltimore*, 7 Pet. 243 (1833) that nothing in the Fifth Amendment forbids a state from taking private property without just compensation, but the decisions of the Court after the adoption of the Fourteenth Amendment consistently forbid such action as a deprivation of property without due process of law. *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, 573 (1898); *Goldblatt v. Town of Hempstead*, 369 U. S. 590, 594 (1962).

It may be conceded that, where property rights alone are involved, the courts will accord a great degree of latitude to the legislature in the exercise of its judgment as to the best way to deal with the situation which calls for legislative intervention. But this does not mean that the

courts will abandon their judicial responsibility of effectuating the mandate of the due process clause. There may be a strong presumption of constitutionality favoring legislation affecting property rights, but the presumption is not irrebuttable. Legislation may be so arbitrary and so wanting in a rational relationship to a lawful legislative end as to require judicial intervention.

We submit that, for reasons shortly to be indicated, that is the situation in the present case. But we go further and suggest that the usual strong presumption of constitutionality is not applicable to the statute involved here. The famous Footnote 4 in *United States v. Carolene Products Co.*; 304 U. S. 144, 151 (1938), is not limited to First Amendment freedoms. It specifically suggests that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

While the "minorities" principally contemplated in *Carolene Products* may well have been racial and religious groups, the decisions cited in support of the proposition were not limited to these groups. (The Court cited, *inter alia*, *McCulloch v. Maryland*, 4 Wheat. 316 (1819) and *South Carolina State Highway Department v. Barnwell Bros.*, 303 U. S. 177 (1938), neither of which involved a racial or religious minority.) Children of unwed parents, as we will shortly indicate, are a discrete and insular minority against whom prejudice exists sufficiently serious to curtail the operation of the ordinary political processes for the protection of minorities.

It follows from this that the rights asserted by the children in the present case are entitled to that more exacting judicial protection which is accorded to First Amendment rights. Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable. But for legislation abridging the rights of a "discrete and insular minority", a more rigorous test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice." *Thomas v. Collins*, 323 U. S. 516, 530 (1945). "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." *Thornhill v. Alabama*, 310 U. S. 88, 95-96 (1940).

Whether measured by the "more exacting scrutiny" test imposed by *United States v. Carolene Products, supra*, or by the usual standard applicable to laws alleged to deprive persons of property without due process of law, the present statute, we submit, cannot stand. The test to be applied was expressed in *Goldblatt v. Town of Hempstead, supra*, 369 U. S. at 594-5 (quoting *Lawton v. Steele*, 152 U. S. 133, 137 (1894)):

"To justify the state in interposing its authority in behalf of the public, it must appear—First, that the

interests of the public \* \* \* require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

The interests of the public do not require the exclusion of children of unwed mothers from the benefits of the Louisiana wrongful death action statute; such exclusion is not reasonably necessary for the accomplishment of a valid legislative purpose; and it is in fact unduly oppressive upon individuals.

#### **(1) The public interest**

There is no legislative history to shed light on the public interest which the Louisiana Court of Appeal held to require exclusion of illegitimate children from the state's wrongful death statute. All we have is the cryptic, unsupported statement that "it discourages bringing children into the world out of wedlock." We believe that, where the constitutional rights of so "discrete and insular" a minority as illegitimate infants are at stake, this Court is not bound by such a statement and may look into the reality of the situation. (This Court had no hesitation in identifying Negro exclusion as the true though unexpressed purpose of the "grandfather clause" invalidated in *Guinn v. United States*, 238 U. S. 347, 365 (1915) and the city redistricting invalidated in *Gomillion v. Lightfoot*, 364 U. S. 339 (1960).) This is particularly so where the sanction and the public purpose it purports to serve are so remote as to invite suspicious judicial scrutiny.

The reality behind the Louisiana statute—or the court's interpretation of it—is that it reflects the ancient shame

and obloquy suffered by children of unwed mothers. "The bastard," as one sociologist put it, "like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured." Davis, *Illegitimacy and the Social Structure*, 5 Am. J. of Sociology 215 (1939). The status of illegitimate children at common law has been vividly described as follows:

The illegitimate child was legally isolated from his parents, for the common law from the Middle Ages recognized no legal relationship between him and his mother, much less between him and his father. The child was *filius nullius*, or *filius populi*, or *here nullius*. He was kin to no one. Since he was not even considered the lawful child of his mother, he could not inherit from her. He could not inherit real property from his own issue. He had no heirs but those of his own body. If he died without lawful issue, any real or personal property he possessed escheated to the crown. He was disqualified from becoming a member of trade guilds. He could not take holy orders without special dispensation. Legally, he was turned adrift. Until the enactment of the poor laws nobody or no unit of government was responsible for him. \* \* \* Clarke, *Social Legislation*, 344 (1957).<sup>1</sup>

Shakespeare recognized that illegitimate children were part of the same type of "discrete and insular minority" as were Jews. With the same eloquence with which, in the famous "Hath not a Jew eyes?" speech in *The Merchant of Venice*, he protested the inequality suffered by Jews, he

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1. Cf. *Deuteronomy* 23:2: "A bastard shall not enter into the congregation of the Lord; even unto his tenth generation shall he not enter into the congregation of the Lord."

protested in *King Lear* (Act I, Sc. 2) the inequality suffered by persons born out of wedlock:

Why bastard, Wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue, Why brand they us With base? with baseness? bastardy? base, base?

Other groups, such as Jehovah's Witnesses, have been such "discrete and insular" minorities for whose protection the Bill of Rights was written.<sup>2</sup> But today the "discrete and insular" minority most cruelly suffering from the same type of social prejudice and discrimination visited upon illegitimate, Jews and Jehovah's Witnesses, are the Negroes. The word "nigger" has vulgarly become a term of obloquy as has in more polite society the word "black." The word "bastard" has similarly become a term of obloquy, and significantly the term "black bastard" has vulgarly come to characterize the depth of obloquy. (Florida law provides that the child of an attempted marriage between white and Negro "shall be regarded as bastard and incapable of having or receiving any estate, real, personal or mixed, by inheritance." Fla. Stat. Ann. §741.11 (1964).)

In *Plessy v. Ferguson*, 163 U. S. 537 (1896) the Court denied any responsibility on its part or on the part of any other agency of government for this type of social prejudice or for correcting or ameliorating it. "Legislation," the Court said (at pp. 551-2) "is powerless to eradicate racial

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2. " \* \* \* They [Jehovah's Witnesses] have suffered brutal beatings; their property has been destroyed; they have been harassed at every turn by the resurrection and enforcement of little used ordinances and statutes." *Prince v. Massachusetts*, 321 U. S. 158, 176, dissent (1944).

instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. \* \* \* If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."

*Plessy* was faulty even in its own frame of reference, for it implied that government and law had no part in the creation of the social inferiority of the Negro, whereas it was the lawful and law-protected institution of slavery which was the source of the social inferiority of the Negro. Similarly, it was the law-imposed nothingness ("*filius nullius*") of the illegitimate child that was the source of his social inferiority.

But even if the *laissez-faire* approach of *Plessy* were valid in respect to affirmative obligation of government to correct or ameliorate social prejudice, *Brown v. Board of Education*, 347 U. S. 483 (1954) makes it quite clear that the Fifth and Fourteenth Amendments forbid government to preserve or reinforce it by giving it the affirmative sanction of law. This, we submit, is what the Louisiana law here in issue does; it gives affirmative sanction of law to the social inferiority of children born out of wedlock by excluding them from the company of those who, by reason of being born in wedlock, possess the right to sue for the wrongful death of their parents.

Indeed, the present law goes further than that upheld in *Plessy*. The situations would be analogous if illegitimate children were simply separated from those born in wedlock, but not otherwise deprived of legal rights. Suppose, for example, the State of Louisiana established a separate

public school system for children born out of wedlock. It is hard to believe that this Court, after *Brown v. Board of Education*, would uphold the constitutionality of such a law. How more unlikely would it be for this Court to uphold a law barring children born out of wedlock from the benefits of all public education. Is that not exactly the situation in the present case, and is it any more an adequate reply in the present case to assert, as the Louisiana court did, that an "action for wrongful death is purely statutory" than it would be in the former case to assert that the right to public education is purely statutory? Cf. *Torcaso v. Watkins*, 367 U. S. 488, 495-496 (1961).

#### (2) *The necessity of the means*

Assuming the validity of the purpose asserted by the Louisiana Court of Appeal—the discouragement of bringing children into the world out of wedlock—the means adopted by Louisiana are not, we submit, necessary for the effectuation of that purpose.<sup>3</sup> It seems beyond the bounds of rationality to assume that depriving children of the right to sue for the wrongful death of their mother can be an effective deterrent of non-marital intercourse. The shortest

3. Since the decedent in this case was the mother rather than the father of the children, the Louisiana court did not assert the doubtfulness of paternity and the concomitant possibility of fraud upon the defendant and his insurer as a justification of the exclusionary application of the state's wrongful death statute. Hence, this Court is not faced with the need of deciding whether exclusion would be constitutionally justified if the decedent were a male. We submit, however, that the result should not be different. The common law presumption of the legitimacy of children born to a married woman is an implicit recognition of the difficulty of proving the paternity of children born in wedlock. Statutory paternity proceedings, on the other hand, are a recognition that proof of paternity is a manageable task for courts, made even more manageable by the development and improvement of scientific means of identifying paternity.

way with fornicators would seem to be to put them in jail or perhaps to compel them to wear the letter "A" as in Hawthorne's *Scarlet Letter*. It is at the very least highly unlikely that any woman about to engage in non-marital intercourse would be thinking of her own wrongful death, or would know that in such case any child which might result from the intercourse would not be able to recover legal damages against the tortfeasor who caused her death.

No other state in the Union shares Louisiana's confidence in the efficacy of the means adopted by it to discourage the birth of children out of wedlock. Louisiana appears to be the only state which deprives an illegitimate child of the right to sue for the wrongful death of his mother. 72 A.L.R. 2d 1235, 1237 (1960); Speiser, *Recovery for Wrongful Death*, 589-590, n. 9 (1967). Empiric evidence supports the refusal of the other 49 states to follow the Louisiana pattern. The rate of illegitimacy in Louisiana (one out of nine live births) is substantially higher than the national average (one in fifteen).<sup>4</sup>

Particularly significant is a comparison of the illegitimacy rates in Louisiana with those in states employing more tolerant standards in determining the rights of children born out of wedlock. For about a half century now North Dakota and Arizona have had laws which in effect abolish illegitimacy.<sup>5</sup> Minnesota too is quite progressive

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4. *Statistical Abstract of the United States*, 47-49 (1966); *Report of the Division of Public Health*, p. 21, Louisiana State Board of Health (1964).

5. "Every child is hereby declared to be the legitimate child of its natural parents and as such is entitled to support and education, to the same extent as if it had been born in lawful wedlock. It shall inherit from its natural parents and from their kindred heir lineal and collateral." 1917 Laws, N.D., c. 70 §1; 1921 Laws, Ariz., c. 114 §1. Oregon has a similar law. Ore., *Rev. Stat.* 109.060 (1963).

in its recognition of the legal rights of children born to unmarried parents.<sup>6</sup> The following table is taken from Vital Statistics of the United States (1965) Volume 1.

	<i>Illegitimate Births</i>	<i>All Births in State</i>
Louisiana	9,434	79,672
Minnesota	3,680	70,746
North Dakota	578	13,200

These figures show clearly that harsh illegitimacy laws have no evident effect on the deterrence of illegitimate births.

We recognize that ordinarily the courts cannot pass upon the wisdom of legislation and that decisions as to the relative efficacy of alternative approaches to a problem requiring legislative resolution must be left to the legislature. But, we submit, a more stringent test is required in the present case. Here the legislature has determined that the "general welfare" calls for the sacrifice of the welfare of defenseless little children. In such a situation, the Bill of Rights imposes upon the state the obligation to present some evidence that the sacrifice is in fact necessary and that it offers a reasonable prospect of efficacy in meeting the problem to which it is addressed. In the present case there is not the slightest evidence within or without the record to support such a conclusion.

### **(3) *The oppressiveness of the means***

Even legitimate ends cannot constitutionally be pursued by means which, though efficacious, are "unduly oppressive upon individuals." *Goldblatt v. Town of Hempstead*,

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6. Minn., Stat. Ann. §257.23 (1959), 176.011 (Supp. 1964).

*supra.* It can hardly be doubted that in the present case the means selected by the State of Louisiana are unduly oppressive upon the orphaned children seeking to invoke the protection of the state's wrongful death statute.

In the first place, the victims of the state's exclusionary statute are already members of a greatly disadvantaged group. They were fatherless from birth, fatherless in circumstances which result in especial harm to them. As one psychiatrist expressed it, "To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." (Fodor, *Emotional Trauma Resulting From Illegitimate Birth*, 54 Archives of Neurology and Psychiatry 381 (1945) quoted in Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 488 (1967).)

Besides being fatherless they are now motherless as well. They are now literally the children of no one.

They are almost certainly poor and quite probably destitute. It is a matter of common knowledge that illegitimacy is far more frequent among the poor than among the well-to-do. In the present case the decedent was a domestic who had to support five children out of her earnings and was required to resort to a charity hospital when she was stricken with the illness which proved fatal.

In his dissent in *Moore v. Dempsey*, 261 U. S. 86 (1923), Mr. Justice McReynolds stated (at p. 102) that "The fact that petitioners are poor and ignorant and black naturally arouses sympathy; but that does not release us from enforcing principles which are essential to the orderly operation of our federal system." Nevertheless, the Court has

often recognized that, where a particularly disadvantaged group is involved, state action which ordinarily might be neutral and hence lawful may in the particular circumstances be oppressive and hence unconstitutional. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Bailey v. Alabama*, 219 U. S. 219 (1911).

In the second place, the means employed by Louisiana to effect its asserted legislative purpose (deterring illegitimacy) is unduly oppressive, because it deprives members of a class of legal aid which the state has recognized they sorely need. At common law, the children of a wage earner upon whom they depended for their own basic needs for survival had no cause of action against those who caused his death. Louisiana, like all the other states in the Union, recognized that under modern standards of a civilized society, this was an intolerable situation and rectified it by statutorily creating the wrongful death action. Dependent children who have one surviving parent need the benefits of such statutes; those who, like the children in the present case, have no surviving parent need them even more desperately, and it is therefore doubly oppressive that they should be deprived of them.

Finally, the means are oppressive because they constitute the punishing of the innocent for the wrongs of the guilty. In primitive times it was not uncommon to punish children for the iniquity of their parents; indeed, it was an aphorism that "The fathers have eaten a sour grape, and the children's teeth are set on edge" (*Jeremiah*, 31:29). But the Hebrew prophets aroused the conscience of society and established the principle that justice forbids the pun-

ishing of "the righteous with the wicked" (*Genesis*, 18:25) and demands that "every one shall die for his own iniquity" (*Jeremiah*, 31:30) and that "The son shall not bear the iniquity of the father" (*Ezekiel*, 18:20). This Biblical principle has become part of the law of the land of the United States, an aspect of "due process" which forbids guilt by association, so recently reaffirmed by this Court in *United States v. Robel*, 36 L.W. 4060, decided December 11, 1967. If due process forbids punishing a person who voluntarily, though innocently, associates with Communists, how much more so does it forbid punishing children for involuntarily associating with their unwed parents.

What the Louisiana exclusionary statute does is to punish the children not for what they have done but because of what they are. It penalizes not conduct but status. In invalidating a statute which made the "status" of drug addiction a criminal offense, this Court said (*Robinson v. California*, 370 U. S. 660, 666 (1962)):

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. \* \* \*

Yet, in practical effect what the State of Louisiana has done is to make it a punishable offense for a child to be illegitimate.

It is no answer to say that the purpose of the Louisiana exclusionary provision is not to punish illegitimate children but to prevent illegitimacy. The purpose of excluding members of the Communist party from employment in defense plants is not to punish Communist "dupes"—if it were,

they would be entitled to indictment, jury trial and all other procedural safeguards applicable to criminal proceedings—but to prevent breach of national security. The purpose of the non-Communist oath requirement of the Labor-Management Reporting and Disclosure Act is to protect the national economy by minimizing the danger of political strikes. Yet this Court held it to be an unconstitutional bill of attainder. *United States v. Brown*, 381 U. S. 437 (1965). If legislative exclusion of all members of the Communist class from the benefits of the Labor Relations Act constitutes an unconstitutional bill of attainder, analogous reasoning would require similar invalidation of the exclusion of children born out of wedlock from the benefit of wrongful death statutes, even though in both cases the purpose is not punitive but preventative.

The crux of the matter is that, whatever may have been the original social purpose of criminal law, its justification today is not that it seeks to avenge past wrongs but to deter future ones. But if punishment is a deterrent then the more cruel and unusual a punishment is, the more effective a deterrent it is likely to be; yet the Constitution forbids cruel and unusual punishments because they are unduly oppressive means to achieve the legitimate end. There is probably no more effective deterrent than the fear of harm to one's children; totalitarian governments, Nazi, fascist and Communist alike, recognize this and frequently make children hostages to insure good behavior on the part of their parents. It was a frequent practice too during the dynastic wars of England before our nation was established, as any reader of Shakespeare's historical dramas knows. Yet the fathers of our nation forbade "corruption of

blood" as a deterrent for even so heinous a crime as treason. U. S. Constitution, Article III, Section 3. Is not the effect of the exclusionary provision here in issue a "corruption of blood" and hence an unduly oppressive means to achieve even a legitimate end?

We note finally that the Louisiana exclusionary provision not only punishes the innocent but acquits the guilty. It would be less difficult to justify the exclusion if, as at common law, the proceeds of the wrongful death suit were to escheat to the state for the benefit of the general community. But that is not the situation in this case. Here, by the fortunate stroke that the parents of the children never participated in the traditional marriage ritual, the wrongdoing defendants suffer no penalty for their wrongdoing. The common law of negligence exonerates the tortfeasor if the victim too was culpable; but no rule of law has ever sanctioned the simultaneous punishment of the innocent and acquittal of the guilty. We doubt very much that the Constitution sanctions such a stultification of law.

### C. Deprivation of Liberty

We have to this point treated the issue in this case as one involving the constitutionality of the deprivation of a property right, and have sought to establish that, because the victims of the deprivation are members of a "discrete and insular" minority, the asserted justification of the deprivation must be subjected to a more exacting judicial scrutiny than is accorded other laws alleged to have deprived persons of their property rights. Here we go further and suggest that more than property rights are involved in this case. The nature of the interest sought to be

vindicated by the plaintiffs in this suit is closer to liberty than it is to property. Accordingly, there is a double obligation to subject its deprivation to an exacting judicial scrutiny. It was not a First Amendment right which was involved in *Skinner v. Oklahoma*, 316 U. S. 535 (1942), wherein Chief Justice Stone, citing footnote 4 in *United States v. Carolene Products Co., supra*, stated (at p. 544) that "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned."

Professor Harry Krause, the author of the excellent article *Equal Protection for the Illegitimate* to which we have previously referred, states the point quite cogently (66 Mich. L. Rev. at 488):

It would seem to be beyond question that a child's right to a familial relationship with his father is more akin to a "fundamental right and liberty" or a "basic civil right of man" than to a mere economic interest. Although money is involved, the illegitimate's claim goes much further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe" and in which recovery in tort is granted for a false allegation of illegitimacy. Indeed, the psychological effect of the stigma of bastardy upon its victim seems quite comparable to the damaging psychological effects upon the victims of racial discrimination, which effects were successfully exploited in the battle over school segregation. (Citations omitted.)

The liberty in *Skinner v. Oklahoma*, wherein this Court struck down a compulsory sterilization law, was the liberty of a mother to procreate. The liberty in the present case

is that of the procreated child to survive and be treated as a human being rather than a nothing. If the former is entitled to an exacting judicial scrutiny for its protection, so too is the latter.<sup>7</sup>

We believe that, measured by the standards applicable generally to property interests, Louisiana's exclusionary provision of its wrongful death statute would not meet the requirements of due process. Where the standards are those governing the deprivation of property rights of "discrete and insular minorities" this is doubly so. Where, we submit, involved is the deprivation of the liberty of members of "discrete and insular minorities" it is incontrovertibly so.

## POINT II

**Exclusion of children of an unmarried mother from the benefits of a wrongful death statute deprives them of equal protection of the laws.**

We have urged in Point I that one of the reasons the Louisiana exclusionary provision constitutes a deprivation of both property and liberty without due process is that it is a particularly egregious or unjustifiable form of discrimination. We here argue that, even if it were less egregious and less unjustifiable, it would violate the mandate of equal protection imposed by the Fourteenth Amendment.

We submit that any discrimination in the treatment by government of individuals based solely on the marital status

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7. That the relationship between the two statutes is close is indicated by the fact that efforts have been made in the Louisiana legislature to provide for compulsory sterilization of females having more than one illicit pregnancy. Article "Illegitimacy" in *Encyclopaedia of Social Sciences*, Rev. ed. 1968.

of the individual's parents at the time of the individual's birth constitutes an invidious discrimination prohibited by the equal protection clause of the Fourteenth Amendment. It may well be that such discrimination was not deemed unreasonable or invidious in 1868 when the Amendment was adopted but, as this Court said in *Harper v. Virginia State Board of Elections*, 383 U. S. 663, 669 (1966) :

\* \* \* the Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. See *Malloy v. Hogan*, 378 U. S. 1, 5-6. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change. (Emphasis in original.)

The guarantee of the Equal Protection Clause is not met merely by a showing that all within a class are treated equally. In *McLaughlin v. Florida*, 379 U. S. 184, 190 (1964) this Court said (quoting from the earlier decision of *Gulf, C. & S.F.R. Co. v. Ellis*, 165 U. S. 150, 155 (1897)) :

Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such purpose." \* \* \* "[A]rbitrary selection can never be justified by calling it classification."

After citing numerous cases in support of this position, the Court continued:

Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal appli-

cation among members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose. \* \* \*

As interpreted by the Louisiana courts, the statute here in issue is neither reasonable nor just in excluding children born out of wedlock from the benefit granted all other children of being able to sue for damages for the wrongful death of a parent.

The pattern of invidious discrimination suffered by the child born out of wedlock in our society is similar to the pattern of invidious discrimination suffered by the Negro. Both forms of prejudice pervade society and are motivated by complex combinations of historical, psychological and sociological factors. In addition, both forms of discrimination stem from a condition of birth in no way connected to the individual's capacities to achieve and in no way involving a choice made by the individual. The marital status of one's parents, like race, should be an utterly neutral factor in determining what benefits an individual receives. Discrimination based on the marital status of one's parents, like discrimination based on the color of one's parents, shocks the conscience because of its fundamentally irrational unfairness.

In *Loving v. Commonwealth of Virginia*, 87 S. Ct. 1817, 1823 (1967), in which this Court held that Virginia's anti-miscegenation laws violated the Equal Protection Clause, this Court said:

Over the years, this Court has consistently repudiated "[d]istinctions between citizens solely because of their

ancestry" as being "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U. S. 81, 100 (1943).

In *McLaughlin v. State of Florida, supra*, at 196, this Court set forth the test for constitutionality of statutes discriminating on the basis of race:

Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification; as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.

In his concurring opinion, Mr. Justice Harlan framed the test as follows (at 197):

I agree with the Court that the cohabitation statute has not been shown to be necessary to the integrity of the anti-marriage law, assumed *arguendo* to be valid, and that necessity, not mere reasonable relationship, is the proper test, \* \* \*.

After citing several cases, he went on:

The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment.

This same necessity test, we submit, should be required of statutes discriminating on the basis of legitimacy. Such a standard would articulate the kind of fundamental neutral principles of law which could guide our courts in applying

in a case-by-case method the guarantee of equal protection to the individual born out of wedlock in his relationship to society. Louisiana's wrongful death statute fails to meet that standard.

In both the case at bar and *McLaughlin*, the state's purpose in the challenged legislation was the prevention of promiscuousness and the preservation of the integrity of the marriage laws. The reasons for rejecting laws claiming to meet these purposes but requiring racial discrimination can be applied with equal force to laws discriminating on the basis of legitimacy of birth. As stated in *McLaughlin* (at 196) :

Those provisions of chapter 798 which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not. These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage. These same provisions, moreover, punish premarital sexual relations as severely or more severely in some instances than do those provisions which focus on the interracial couple. Florida has offered no argument that the State's policy against interracial marriage cannot be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as §798.15 which singles out the promiscuous interracial couple for special statutory treatment. In short, it has not been shown that §798.05 is a necessary adjunct to the State's ban on interracial marriage.

The holding in *Oyama v. State of California*, 332 U. S. 633 (1948) is directly on point. This Court there held that California's Alien Land Law violated the Equal Protection Clause in excluding from the benefits of certain California laws those children whose fathers were ineligible for citizenship. Under the Alien Land Law, the child of a father who was not permitted to hold land was confronted with the presumption that a conveyance financed by his father and recorded in his name was not a gift at all but that the land was being held in "something very akin to a resulting trust" (*ibid.* at 642). Failing to rebut the presumption resulted in the forfeiture of that land to the state. Fred Oyama, the citizen child, was denied equal protection of the law because (at 645) :

[w]hen, \* \* \* [a] \* \* \* Chinese or English father uses his own funds to buy land in his citizen son's name, an indefeasible title is presumed to vest in the boy; but when Kajiro Oyama [the father] arranges a similar transfer to Fred Oyama, the Alien Land Law interposes a presumption just to the contrary. Thus, as between the citizen children of a Chinese or English father and the citizen children of a Japanese father, there is discrimination; \* \* \*

Fred Oyama was held to have been denied the equal protection of the law because the Court could not find sufficient justification in the legislative purpose of insuring that his father did not evade the prohibition on landholding to justify denying the former a right to which he would otherwise be entitled. The Court said (at 646-7) :

The only justification urged upon us by the State is that the discrimination is necessary to prevent evasion of the Alien Land Law's prohibition against the

ownership of agricultural land by ineligible aliens. This reasoning presupposes the validity of that prohibition, a premise which we deem it unnecessary and therefore inappropriate to reexamine in this case. But assuming, for purposes of argument only, that the basic prohibition is constitutional, it does not follow that there is no constitutional limit to the means which may be used to enforce it.

Only a showing of the strongest necessity can ever justify denying a significant right to one person on the ground that the conduct of another must be regulated. No such showing has been made in the present case.

The decision of November 8, 1967, of the three-judge court in *Smith, et al. v. King*, 36 L.W. 2301, decided November 8, 1967, now on appeal to this Court, is directly on point. The District Court held:

It should be noted that there is no vested legal right for anyone to receive public financial assistance; neither the United States nor the Alabama Constitution requires Alabama to grant financial assistance to needy dependent children. However, once Alabama undertakes to provide a statutory program of assistance, it must do so in conformity with the constitutional mandate of equal protection. Alabama cannot pick and choose the mothers and children it will aid through the use of some classifications which are not rationally related to the purpose of the applicable statutes.

After citing cases, the court continued:

The irrationality and the unreasonableness of the Alabama regulation is starkly revealed when it is realized that the regulation singles out from the Alabama needy dependent children a particular class who are illegitimate, or whose mothers engage in an illicit sexual rela-

tionship, or who have an illegitimate child born in their family, and for one or more of these reasons renders ineligible those children otherwise eligible to receive financial benefits under the Aid to Dependent Children program. This "substitute father" gains his parental status under the Alabama regulation not by any act of fatherhood to the children and not by any support furnished, but merely by having sexual-relations with the mother.

The court then concluded that the substitute father regulation deprives those children of equal protection of the law because the substitute father regulation is "an arbitrary and discriminatory classification which results in the denial of financial benefits to needy children who are clearly eligible and entitled to receive such benefits \* \* \* and that said children are denied for reasons unrelated to and in conflict with the purposes of these statutes."

The state sought to justify its "substitute father rule" on the ground that it was designed to discourage the continued "procreation of illegitimate children by persons who seem economically unable to care for them \* \* \*" The court characterized this argument as utterly unrealistic, and noted that the issue before the court in no way concerned approval or disapproval of sexual promiscuity.

### Conclusion

Louisiana's statutory purpose in providing for wrongful death actions is not met by excluding from its protection those who need it most. Nor are the public policies of encouraging marital stability, regularizing family life and discouraging promiscuity materially affected by the exclusion

of illegitimates from the benefits of the statute. The harsh burden imposed on the children in the present case cannot be justified by the assertion that their desperate predicament resulting from being denied the right to sue will stop others from producing babies out of wedlock. Nor can it be justified by any other test which meets the requirements of the Federal Constitution. In short, the decision of the Louisiana courts should be set aside and a mandate from this Court should issue requiring that the Levy children be treated in law as they are in fact—children.

Respectfully submitted,

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December, 1967.



JAN 22 1968

Supreme Court of the United States.

JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 508

THELMA LEVY, in her capacity as Administratrix of the  
succession of LOUISE LEVY and as tutrix of and on  
behalf of the minor children of LOUISE LEVY, said  
children being: RONALD BELL, REGINA LEVY,  
CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY  
HOSPITAL OF LOUISIANA at NEW ORLEANS  
BOARD OF ADMINISTRATORS and W. J. WING,  
M.D., and A. B. C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 508.

THELMA LEVY, in her capacity as Administratrix of the  
succession of LOUISE LEVY and as tutrix of and on  
behalf of the minor children of LOUISE LEVY, said  
children being: RONALD BELL, REGINA LEVY,  
CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

versus

THE STATE OF LOUISIANA through the CHARITY  
HOSPITAL OF LOUISIANA at NEW ORLEANS  
BOARD OF ADMINISTRATORS and W. J. WING,  
M.D., and A. B. C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Appellant brought this action under Louisiana Civil Code Article 2315 alleging that she was tutrix of the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appellee.

lant only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth Circuit, affirmed the judgment of the lower court and denied appellant a right or cause of action under Article 2315 because of illegitimacy of the minor children. Appellant then sought review in the Supreme Court of Louisiana and was denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was taken.

#### **SUMMARY OF ARGUMENT.**

Louisiana's wrongful death statute both under the Civil Code and court interpretation has denied illegitimate children a right of action for the wrongful death of a parent. No discrimination or racial overtones have characterized the administration of that statute. Illegitimates of all races have been treated equally and impartially.

Louisiana has evidenced a concern for illegitimate children and has provided a simple and effective manner whereby they can be legitimated and admitted to family status. Because the children involved herein were illegitimate and never legitimated there existed no bar to an action for wrongful death under Article 2315 of the Civil Code. The action was time barred by the failure of an illegitimate relative to sue within the peremptive period.

The attack on the statute as unconstitutional is grounded upon four arguments none of which appellee

submits are valid. The statute is not a racial statute and does not discriminate on the basis of color. Further, the statute does not deprive the illegitimate children of their property without due process of law. The statute is not a penal statute penalizing persons on account of their status. Finally, Louisiana has fully protected and preserved the basic human rights of illegitimates and has undertaken to protect illegitimates in a manner consistent with the general law of Louisiana.

Article 2315 of the Civil Code is not an invidious discrimination. Its classification is reasonable and related to a legitimate legislative purpose. The reasonableness of the classification and the relationship to a legitimate legislative end are presumed. There is no proof that the statute is administered in an arbitrary manner. Louisiana, in the entirety of its legal system, has sought to balance the interests of the illegitimate with those of the society as a whole. In a state whose legal system so closely connects family status with property rights, the requirement of legitimacy and problems of status generally are of vast importance. Other states have employed the classification with regard to inheritance and wrongful death.

Finally, the Court should exercise its own restraint and not employ the Fourteenth Amendment as a vehicle for taking national cognizance of matters historically and traditionally of state concern only. Statutes granting recovery for wrongful death and inheritance are traditionally and historically within the exclusive province of the individual states.

**ARGUMENT.**

**MAY IT PLEASE THE COURT:**

**POINT I.****LOUISIANA'S WRONGFUL DEATH STATUTE AND  
HER LAWS OF LEGITIMATION PROTECTED THE  
RIGHTS OF THE PARTIES TO THIS LITIGATION.****I. ILLEGITIMATE CHILDREN REGARDLESS OF  
RACE HAVE NO RIGHT OR CAUSE OF ACTION  
UNDER ARTICLE 2315 OF THE LOUISIANA RE-  
VISED CIVIL CODE OF 1870.**

- (a) **A Right Or Cause Of Action For Wrongful Death  
Did Not Exist At Common Law Or Civil Law And  
Is Solely A Creation Of State Statutory Law And  
Must Be Construed Strictly.**

The Common Law did not grant a right or cause of action for wrongful death. The Civil Law was to the same effect. *Panama R. Co. vs. Rock*, 266 U. S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). As a result, the right and cause of action for wrongful death is a creature of statute. See Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 Tul. L. Rev. 201 (1932). According to Judge Dawkins of the Western District of Louisiana, "To begin with the cause of action under Article 2315—originally non-existent under civil or common law . . . was created by the Legislature in derogation of common or civil right. Therefore, as the Louisiana courts repeatedly have said, it must be

narrowly, strictly construed . . . cause of action for wrongful death, created by Article 2315, is substantive, purely personal, and accrues only to the beneficiaries named, in the order of their naming." *Bounds vs. T. L. James & Co.*, 124 F.Supp. 563, 567 (W.D. La., 1954).

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana. *Premeaux vs. Henry Ford & Son*, 155 La. 106, 98 So. 856 (1924); *Thaxton vs. Louisiana Ry. & Nav. Co.*, 153 La. 292, 95 So. 773 (1923); *Van Amburg vs. Vicksburg S. & P. R. Co.*, 37 La. Ann. 650 (1885); *Hubgh vs. New Orleans & C. R. Co.*, 6 La. Ann. 495 (1851).

This statute governs all rights and causes of action for wrongful death and is to be construed *sui generis* and strictly. *Maher vs. Schlosser*, 144 So.2d 706 (La. App. 1962); *Young vs. McCullum*, 74 So.2d 339 (La. App. 1954); *Conrad vs. Citizens Cas. Co. of N.Y.*, 141 F.Supp. 166 (E.D. La. 1956); *Miller vs. American Mut. Liab. Ins. Co.*, 42 So.2d 328 (La. App. 1949); *Reed vs. Warren*, 172 La. 1082, 136 So. 59 (1931); *Kerner vs. Trans-Mississippi Terminal R.R.*, 158 La. 853; 104 So. 740 (1925); *Flash vs. Louisiana Western Ry. Co.*, 137 La. 352, 68 So. 636 (1915); *Chivers vs. Roger*, 50 La. Ann. 57, 23 So. 100 (1898).

Louisiana conferred the action for wrongful death and prescribed the terms upon which the action

might be asserted. In this regard, a Pennsylvania court held:

"It must be remembered that at common law there was no right on the part of survivors to sue for their father's or husband's death and they must now take the privilege upon the terms granted by the . . . legislature . . . and one of those terms is that the parties must be lawful children or a lawful widow. Petitioners have found no cases which give illegitimate children any right to recover in a death action and we believe there are no such." *Kemmerer vs. Reading Co.*, 64 Pa. D & C 433, 23 Leh. Co. L.J. 5 (1948).

**(b) Article 2315 Defines Rights In Terms Of Status And Makes No Exceptions Based Upon Particular Factual Situations.**

The law creating the action for wrongful death and the right to assert that action speaks of its beneficiaries only in terms of status. It speaks of a "surviving spouse and child or children," the "surviving father and mother of the deceased" and the "surviving brothers and sisters of the deceased." Article 2315. The law "does not attempt to make any distinctions based upon the loving father or mother and the less attentive parent, the loyal and disloyal child, the unfaithful and faithful wife, the unconcerned as opposed to the dedicated brother or sister. The law is blind to the personal qualities that may color and distinguish a relationship; it asks only that the relationship exist, and, therefore, the status."

Article 2315 makes no racial distinctions on its face. To persons occupying a given status it accords equal rights. There is no distinction as between white or colored or oriental or Indian children or surviving spouses. The Article asks only that the status exist.

In matters of family law, status is the starting point. In speaking of matters involving law generally and family law in particular Justice Holmes declared, "All rights are consequences attached to filling some situation of fact." Holmes, *The Common Law* 340. At Roman Law status was likewise all important. Buckland, *The Main Institutions of Roman Private Law* 54. In their monumental work concerning the history of English legal institutions Pollock and Maitland stress the importance of correct familial status as determinative of legal rights. Pollock and Maitland, *History of English Law* 240 et seq. (2nd Ed.).

(c) **"Child" As Used In Article 2315 Of The Revised Civil Code Of 1870 Means Legitimate Child, And Has No Reference To Race Whatsoever.**

Speiser in his work *Wrongful Death* declares:

"Tiffany, in his pioneer treatise on wrongful death, comments that 'a bastard is not a "child,"' within Lord Campbell's Act.'

If there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death benefici-

aries, refers to a legitimate child or to legitimate children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." Speiser, *Wrongful Death*, § 10.4, 537. See, also, 72 A.L.R. 2d 1235.

In Article 3556 of the Louisiana Civil Code the term "children" does not include natural children unless such natural children have been legitimated.

Louisiana's jurisprudence is replete with cases which indicate that "child" means legitimate child and that illegitimate children may not recover for the wrongful death of a parent. *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964); *Carter vs. Canal Ins. Co.*, 154 So.2d 476 (La.App. 1963); *Carter vs. Musso*, 151 So.2d 97 (La.App. 1963); *Scott vs. La Fontaine*, 148 So.2d 780 (La.App. 1963); *Buie vs. Hester*, 147 So.2d 733 (La.App. 1962); *Cheeks vs. Fidelity and Casualty Co. of New York*, 87 So.2d 377 (La.App. 1956); *Jackson vs. Lindlom*, 84 So.2d 101 (La.App. 1956); *McConnell vs. Webb*, 226 La. 385, 76 So.2d 405 (1954); *Board of Port Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953); *Thompson vs. Vestal Lumber and Mfg. Co.*, 16 So.2d 594, aff'd. 208 La. 83, 22 So.2d 842 (1944). It is well settled that a right of recovery in favor of a child or children under

Article 2315 of the Civil Code is limited to a legitimate child or children. *Thompson vs. Vestal Lumber and Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1944); *Youchican v. Texas and Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Green vs. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Landry v. American Creosote Wks.*, 119 La. 231, 43 So. 1016 (1907); *Lynch vs. Knoop*, 118 La. 611, 43 So. 252 (1907).

The courts of the United States in passing on the question have denied illegitimates or their parents a right or cause of action under Article 2315 of the Civil Code. *Glona vs. American Guarantee & Liability Insurance Co.*, 379 F.2d 545, cert. granted (5th Cir. 1967); *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La. 1965); *Evans vs. United States*, 100 F. Supp. 5 (W.D. La. 1951).

The strength of the requirement of legitimacy is evidenced by the fact that children of a putative marriage may not recover under Article 2315. Putative children must be legitimated. *Chivers vs. Couch Motor Lines*, *supra*; *Carter vs. Musso*, *supra*; *Buie vs. Hester*, *supra*; *Jackson vs. Lindlom*, *supra*.

It makes no difference that the illegitimate child was dependent upon the parent for support. *Board of Port Commissioners vs. City of New Orleans*, *supra*.

Acknowledgment will not serve to cure a defect in legitimacy. *Lynch vs. Knoop*, *supra*; *Scott vs. La Fontaine*, *supra*; *Cheeks vs. Fidelity and Casualty Co. of New York*, *supra*.

In the legal history of Article 2315 as reflected in the case law there is not the slightest suggestion that the requirement of legitimacy is intended as some form of covert discrimination against the colored race. The decisions are uniform in their applicability. The question of race enters none of the jurisprudence.

**(d) Louisiana Has Long Denied A Right Or Cause Of Action To Illegitimates Without Regard To Race, Color Or Creed.**

The jurisprudence just cited goes back to 1907 when *Lynch vs. Knoop, supra*, was decided. Had the interpretation of Article 2315 by the courts as requiring legitimacy been incorrect, it only stands to reason that the legislature of Louisiana would have seen fit to so alter the codal article so as to permit a recovery. In *Abraham vs. Connecticut Fire Ins. Co.*, 177 So.2d 295, (La.App. 1965), it was declared:

"The statute being *sui generis*, this court is not at liberty to question the wisdom of the legislature in confining, restricting and limiting the benefits of the law to those classes of relations expressly enumerated. Conceding the authority of the legislature to include illegitimate relations within the scope of the statute if that body so desires, it nevertheless remains it has not as yet seen fit to do so. We can only conclude, therefore, that the legislature did not intend to extend to illegitimate or natural brothers and sisters the initial right of survivorship of those actions as encompassed in subject statute." 177 So.2d at 302.

See also, *Cheeks vs. Fidelity & Casualty Co. of N.Y.*, 87 So.2d 377 (La.App. 1956). A close examination of the decisions cited in the preceding sections fails to disclose any concern for the race of the parties. The decisions require only that the proper status exist.

(e) **Because Louise Levy Treated Her Children As Though They Were Legitimate And Loved Them, There Exists No Basis For Making An Exception To The Rule Of Legitimacy And To Do So Would Be To Practice Prohibited Discrimination.**

The children on whose behalf this action was brought were concededly illegitimate. But it has been argued that because their mother loved them and sacrificed for them and treated them as though they were legitimate, they should be admitted to that status to which legitimates are entitled, namely, a right and cause of action for wrongful death.

Undoubtedly many mothers have loved their illegitimate children, have sacrificed for them and have treated them as legitimate. But the quality of the relationship between parent and child should not be permitted to overcome the inadequacy of status. See, *Youchican vs. Texas & Pacific Ry. Co.*, 147 La. 1080 86 So. 551 (1920). As pointed out earlier: putative children may not recover, dependent illegitimate children may not recover, and acknowledged children may not recover. Surely these putative, dependent and acknowledged children were loved by the parent who sacrificed for the child and who treated the child

as legitimate. But Louisiana has not granted exceptions in those cases and there exists no reason why it should do so in this case.

To grant the right and cause of action to illegitimate children whose parent loved and sacrificed for them and to withhold it from those less fortunate would be to discriminate between illegitimates and thus deny to some illegitimates that equal protection of the laws and due process of law which the Levy children invoke herein.

## **II. UNDER LOUISIANA LAW THE LEVY CHILDREN MIGHT HAVE BEEN LEGITIMATED WITH EASE DURING THE LIFETIME OF LOUISE LEVY.**

The arguments of the appellant and the various *amici* manifest a concern for the fact that children who are illegitimate are without hope of ever attaining the status of legitimates. Under Louisiana law legitimization was open to these children and the legitimization of a child is accomplished with ease.

Had Louise Levy married the father of these illegitimate children and acknowledged them formally or informally the children would have been legitimated. Louisiana Civil Code of 1870, Article 198.

The Levy children would have enjoyed all of the rights of legitimate children had the mother married the father. The Civil Code declares that such children have the same rights as if they were born dur-

ing marriage. Louisiana Civil Code of 1870, Article 199.

Even if Louise Levy did not marry the father of the children, she could have legitimated the children by an act of legitimization passed before a notary and two witnesses. Louisiana Civil Code of 1870, Article 200; Louisiana Revised Statutes 9:391. This would have been as simple if not simpler than the act of conveying title to real property. Once legitimated these children would have had the rights of legitimate children in so far as an action for wrongful death might be concerned.

Thus, had Louise Levy married the father of these children and formally or informally acknowledged them or had she legitimated them by a simple notarial act, the children would have acquired the status so crucial in this case.

### **III. THE ILLEGITIMACY OF THE CHILDREN DID NOT PREVENT A WRONGFUL DEATH ACTION; ANOTHER PARTY WAS ENTITLED TO ASSERT RIGHTS UNDER THE STATUTE.**

The argument has been made that to refuse these illegitimate children a right or cause of action will permit the negligent tortfeasor to go unpunished. The argument assumes that if the children do not have a cause of action or right of action, that somehow the tortfeasor escapes responsibility for his actions.

The argument is without merit. Under Louisiana Civil Code Article 2315, the cause of action for wrongful death goes to the surviving spouse and child or children of the deceased. In default of these persons the action survives to the surviving father and mother of the deceased who may then make claim and punish the alleged wrongdoer.

Recognizing that in default of the children being able to assert claims herein, the mother (who is legitimate) might assert such a claim, appellant added the mother as a party plaintiff to this action. Supplemental and Amending Petition filed October 13, 1965. Record pp. 26-29. Unfortunately, for the mother of Louise Levy, this claim came more than one year after the death of Louise Levy and hence was time barred. Louisiana's wrongful death statute sets up a peremptive as opposed to a prescriptive period of limitations. *Mejia vs. United States*, 57 F. Supp. 1015, affirmed 152 F.2d 682, cert. denied 66 S.Ct. 1366 (E. D. La. 1944); *Gabriel vs. United Theaters*, 221 La. 219; 59 So.2d 127 (1952); *Blanke vs. Chisesi*, 142 So.2d 45 (La.App. 1962). If no suit may be lodged against the alleged tortfeasor, that follows not as a result of the illegitimacy of the children, but only because suit was not timely filed by the party with a cause of action.

**POINT II.****ISSUES RAISED BY APPELLANT.**

The constitutional arguments advanced by appellant and various *amici* under the Equal Protection and Due Process clauses fall into several categories. It is claimed that the Louisiana wrongful death statute discriminates against Negroes in its requirement of legitimacy, denies persons rights of property, punishes persons on account of status, and denies fundamental human familial rights. Each of these various allegations are without merit.

**I. RACIAL DISCRIMINATION.**

Article 2315 of the Louisiana Civil Code allegedly discriminates on account of race. The argument advanced by appellant hinges upon the fact that more illegitimates are born to Negroes than to whites, that Negro children have less opportunity for adoption and that they are poor and oppressed. On the basis of these allegations, not part of the Record and subject to cross examination, appellant would have the Court view the statute as an enactment of a racial character and therefore suspect and requiring the most compelling justification. Appellant would have the Court apply the standards of *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964); *Bolling vs. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954); *Oyama vs. California*, 332 U.S. 633, 68 S.Ct. 269 (1948); *Korematsu vs. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944), and *Hirabayashi vs. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943).

Appellees submit that there is a vast difference between the statute here under scrutiny and those involved in the cited cases. On its face the statute in *McLaughlin* sought to regulate and penalize conduct on the basis of race alone. Occupancy of a room at night by persons of the white and Negro races together was proscribed. The sole criterion under the statute was racial. *Bolling vs. Sharpe, supra* concerned itself with racial segregation in public schools of the District of Columbia. In *Oyama* membership in the Japanese race with Japanese ancestry was the sole criterion for permitting possible escheats of property to the state. *Korematsu* and *Hirabayashi* dealt with deprivation of liberty and property based upon membership in the Japanese race. All of these cases have a common theme. Legislation which uses race alone as a classifying criterion is proscribed or legislation which assigns specific traits or qualities to individuals on the basis of their race will be prohibited. The statute in question has none of the defects of the statutes involved in the cited cases.

Article 2315 has no history of racial discrimination. The cases cited in outlining the Louisiana jurisprudence in regard to prohibiting recovery by illegitimate do not have the slightest suggestion that the article is administered with race in mind. The statute on its face makes no mention of race. It confers a right and cause of action on all persons qualifying for its benefits regardless of their race.

Appellant would further urge that the act is a discrimination based on ancestry. No particular ances-

try such as the Japanese is singled out for special treatment. Illegitimates are not punished as criminals or moved out of their homes and relocated simply because they happen to be illegitimate. No dangerous traits or qualities are assigned to them. Louisiana asks only that persons qualify as beneficiaries under the wrongful death statute. No impediment exists prohibiting the qualification of these persons. They are subject to legitimation regardless of race or any other characteristic.

Assuming *arguendo* that the requirement of legitimacy affects Negroes more than others, that alone will not invalidate a statute. Numerous statutes and regulations affect one group more than another. Legislation by its very nature involves classification. *Rinaldi vs. Yeager*, 384 U.S. 305, 86 S.Ct. 1497 (1966); *Kotch vs. Board of River Port Pilot Com'rs*, 330 U.S. 552, 67 S.Ct. 910 (1947). The fact that Negroes may be more affected by the requirement of legitimacy does not render the statute void. The only criterion should be that the requirement of legitimacy have some relevance to a legislative purpose. *Rinaldi vs. Yeager*, *supra*.

## II. DEPRIVATION OF PROPERTY.

On behalf of the illegitimate children it is claimed that the action for wrongful death is a property right of which they are being deprived without due process of law. The statute alone confers the right to sue and it confers it upon certain beneficiaries. As administered by the courts and required by the definition of

"children" in the Civil Code, the statute confers no property right on these children, yet they claim to be entitled to this property right.

Under the provisions of Louisiana Civil Code Articles 918 and 2315 these illegitimate children may inherit whatever property right their mother had in bringing an action for her personal injuries and pain and suffering. *Succession of Baragona*, 233 La. 537, 97 So.2d 215 (1957); *Goins vs. Gates*, 93 So.2d 307 (La.App. 1957). But that issue is not before the court in these proceedings. The children have not sued in the capacity as heirs and have not qualified or been recognized as the heirs of Louise Levy. The children have sued only in their capacity as children bringing an action for wrongful death. Their rights as survivors to any action which might have been asserted by Louise Levy are not before the Court.

This Court has indicated that it prefers not to sit as a super legislature and in the name of due process or equal protection pass upon the wisdom or folly of state legislatures with regard to regulation of property rights of their citizens. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963); *Williamson vs. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461 (1955).

Before the statute in question may be properly invalidated as a deprivation of property it must be shown that the statute works an invidious discrimination. *Ferguson vs. Skrupa*, *supra*; *Williamson vs. Lee Optical Co.*, *supra*. No such invidious discrimination has been demonstrated.

It has been argued that under Louisiana law an employer is bound to pay compensation benefits to the illegitimate child of a deceased employee and may thereafter recover his payments in an action against the tort feasor. The contention is to the effect that the employer has a right denied to the illegitimate child. This is not the case. The employer does not have a legal subrogation but rather has an independent cause of action. *Board of Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953). The wrongful death statute and the compensation statute are different and convey different rights based on varying criteria. *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (Pa. 1962)..

### III. PENALIZING THE CHILDREN.

The statute is attacked as penalizing the children because it renders them guilty without fault on their part. It is argued that the children had no hand in their creation and yet because of their status as illegitimates they are punished. An appeal is made to *United States vs. Robel*, 36 L. W. 4060 (Decided December 11, 1967); *NAACP vs. Overstreet*, 384 U.S. 118; *Robinson vs. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962); *Oyama vs. California*, 332 U.S. 633, 68 S.Ct. 269 (1948).

The statute in question is not a penal statute. It does not legislate against a particular status. It does not imprison the children because of their illegitimacy or make them ineligible for employment. It seeks to

exact no penalty from the children. In fact the law of Louisiana provides for the legitimation of the children in a fairly simple manner. It grants them a limited right of inheritance. If to deny the illegitimate a cause of action for wrongful death is to penalize him, then every law of every state dealing with illegitimates and their rights of inheritance is a penal statute. The statute is a permissive one. Without it no action for wrongful death would exist. It confers rights rather than takes them away. Legislation of a necessity must classify. On the basis of classification rights are granted or withheld or taken away. The failure to grant a right to a particular class has not been construed as penalizing that class because of its status. Appellant places great emphasis upon *Oyama*. The essence of *Oyama* is that it was a classification based upon race alone without relation to a legitimate legislative purpose. As will be demonstrated, the classification employed is reasonable and related to a legitimate legislative purpose. The classification does not have the overtones of race.

#### **IV. FUNDAMENTAL FAMILIAL HUMAN RIGHTS.**

On behalf of the Levy children the assertion is made that they and all illegitimates are being denied fundamental familial rights. It is claimed that they have fundamental rights to a legitimate relationship with their mother.

The State of Louisiana has not taken from these children their right to a legitimate relationship with their mother. A child may be easily legitimated and will have all of the rights of a legitimate child includ-

ing the right of action for wrongful death. Illegitimate are not precluded from owning property, marrying, and living perfectly normal lives.

It is argued that the fact that a person may be considered illegitimate works a particular hardship on that individual of a most oppressive nature affecting his health and well being. If that be so, the opinion of mankind may have been responsible for that condition, not the provisions of Article 2315. If a person has such a fundamental, almost First Amendment Right, not to be considered illegitimate, then every wrongful death statute or inheritance law employing the classification has run afoul of the Constitution.

The laws of Louisiana evidence a concern for the illegitimate. They provide for his legitimation, his subsequent inheritance, his subsequent action for wrongful death, the manner of his acknowledgment, the proof of paternity, and the proof of maternity. Louisiana has evidenced a clear concern for the rights of the illegitimate. Louisiana Civil Code of 1870 Articles 198-214, 238-245, 917-928, 1236, 1483-1488, 1496, 2315; Louisiana Revised Statutes 9:391.

**POINT III.**

**TO REFUSE TO ALLOW THE APPELLANT A RIGHT OF RECOVERY IS NOT VIOLATIVE OF THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS REQUIREMENTS OF THE FEDERAL CONSTITUTION.**

**I. TO HOLD THE STATUTE UNCONSTITUTIONAL, THE COURT MUST FIND INVIDIOUS, PURPOSEFUL AND ARBITRARY DISCRIMINATION WHOLLY LACKING IN RATIONALITY.**

The test used to determine the constitutionality of a state statute under the equal protection of the laws or the due process clauses has evolved several criteria for the testing of state statutes. Statutes involving racial discrimination are measured by a different standard than those which do not have a system of racial classification.

The Court has held that statutes drawn according to race are patently invidious and must be supported by some overriding purpose. Where the color of skin is the sole test and distinguishing basis of classification, such statutes are manifestly unconstitutional. *Loving vs. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 817 (1967); *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964).

Where statutes, however, do not classify persons on the basis of race, such statutes must be shown to be invidious discriminations, which are intentional, purposeful, arbitrary and without reason.

*Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957) has outlined the basic constitutional guidelines to be followed in scrutinizing state statutes on equal protection grounds:

"In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. The rules for testing a discrimination have been summarized as follows:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must

carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369." 354 U.S. at 463-64.

See also *McGowan vs. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2nd Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs. Ryder*, 176 F.Supp. 90 (W.D. La., 1959); *W.M.C.A. vs. Simon*, 208 F.Supp. 368 (S.D. N.Y., 1962).

The Court will not substitute its judgment for that of a state legislature on the grounds that the Court entertains a different set of economic or social beliefs. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963).

The element of intentional or purposeful discrimination necessary to establish a denial of equal protection of the law is not presumed: *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). In *Snowden vs. Hughes*, *supra*, the Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an ele-

ment of intentional or purposeful discrimination . . . But a discriminatory purpose is not presumed . . . there must be a showing of 'clear and intentional discrimination' . . ." 321 U.S. at 8.

Nor will unreasonableness be presumed:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Com'r's*, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 55 S.Ct. 538, 79 L.Ed. 1070; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909. . . .

The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call

for this legislative treatment. See *Salsburg v. State of Maryland*, 346 U.S. 545, 552-553, 74 S.Ct. 280, 284, 98 L.Ed. 281; *Kotch v. Board of River Port Pilot Com'rs, supra.*" *McGowan vs. State of Maryland*, 366 U.S. 420 at 425-427.

Appellant has shown no clear and intentional discrimination, unreasonableness or arbitrariness.

Thus, it is respectfully submitted that on the basis of the evolving history of the Fourteenth Amendment's equal protection and due process clauses every indulgence will be given a non-racial state statute as to its rationality, purpose and fairness as against a charge of invidious discrimination.

**II. THE STATUTE IN QUESTION IS NOT A RACIAL STATUTE, DOES NOT EMPLOY A RACIAL CLASSIFICATION, IS FAIR, AND EQUALLY ADMINISTERED, AND HAS A RATIONAL RELATIONSHIP TO A LEGITIMATE LEGISLATIVE PURPOSE.**

**(a) The Statute Employs No System Of Racial Classifications.**

The system of classification which is employed in Article 2315 is as to legitimates and illegitimate. The word "race" appears nowhere in the statute and there is no evidence of any intent on the part of the framers of the statute to administer it upon a racial basis. The history of the statute and its administration, as reflected in other portions of this Brief, plainly establish that this is not a racial enactment.

The two Federal Courts which have passed or commented on the classification into legitimates and illegitimate as used in Article 2315 have found no fault with the classification on constitutional grounds.

An argument as to the unconstitutionality of the distinction between persons as legitimate and illegitimate was presented in *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La., 1965). Judge Putnam of the Western District of Louisiana declared:

"In addition to the argument as to the status of these minors plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not afford them an opportunity to sue for the wrongful death of their natural parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose." 244 F. Supp. at 653.

The Court of Appeals for the Fifth Circuit passed upon the very issue raised in this matter in June of 1967 in *Glona vs. American Guarantee and Liability Ins. Co., et al.*, 379 F.2d 545, cert. granted December 4, 1967 (5th Cir. 1967). The case expressly declared that the classification of persons into legiti-

mate and illegitimate for the purpose of Article 2315 of the Louisiana Civil Code was a reasonable legislative classification.

In the *Glona* case, a mother sued for the wrongful death of her son who was illegitimate but was informally recognized by her. Passing upon the issue of legitimacy, the court declared:

"As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485." 379 F.2d at 546.

**(b) The Statute Is Related To A Legitimate Legislative Purpose.**

In Louisiana, perhaps more than any other state, rights in property are connected with family status. This is part of the Civil Law and the legislature of Louisiana is entitled to pursue policies which tend to protect and foster a legal system wherein property rights and family relationships are connected. Rights in family confer rights in property.

A cursory study of Book I of the Louisiana Code entitled "Of Persons" demonstrates the all important role of status in the Louisiana legal system. A study of Title I entitled "Of Successions" and Title II "Of Donations Inter Vivos and Mortis Causa" of Book III demonstrates the connexity between rights in property and family status.

The policy of the state is to encourage and preserve the legitimate familial relationships. In Louisiana the marital institution is encouraged and protected. The Civil Code considers marriage as a civil contract and prescribes the requirements as to participants, performance and legality of relations. Civil Code Articles 86-137.

The institution of community property, whereby the joint effort of husband and wife is promoted, supports the importance of the marital institution. The division of property into separate and community property evinces a legislative support for a strong marital institution. Morrow, Matrimonial Property Law in Louisiana, 34 Tul. L. Rev. 3 (1959). The protection of the widow through usufruct lends support to the marital institution. Oppenheim, One Hundred Fifty Years of Succession Law, 33 Tul. L. Rev. 43 at 46 (1958). Common law marriages being unrecognized evidences a support of the marital institution and a concern for status. Civil Code Article 90 et seq.; *Humphreys vs. Marquette Cas. Co.*, 95 So.2d 872, amended 235 La. 393, 103 So.2d 909 (1958), *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964). But the

law of Louisiana is quick to protect the innocent in a putative marriage situation and award an innocent party appropriate status for his or her protection. Civil Code Articles 117,118 Note, Tul. L. Rev. 551 (1957).

The divorce laws of Louisiana are likewise stringent. Civil Code Articles 138-145; Louisiana Revised Statutes 9:301 et seq.; Comment, Divorce in Louisiana: Grounds and Defenses, 24 Tul. L. Rev. 443 (1950).

The Civil Code defines the rights of and classifies children. It defines the reciprocal duties of parent and child. Civil Code Articles 178-245. The father, almost like a Roman *pater familias* is responsible for the acts of his children, his servants and the community between himself and his wife. Civil Code Articles 237, 2318, 2320, 2409-2410.

The tutorship and care of minors is an important concern of the law. Civil Code Articles 246-364.

The law looks to protection of the rights of legitimate relationships. Illegitimates are not permitted to inherit in the same manner as legitimates. Oppenheim, *supra* at 50. An illegitimate child may not interfere with the rights of a legitimate relation. Civil Code Articles 200,918. *Evans vs. United States*, 100 F. Supp. 5 (W.D. La. 1951).

The Code provides for a system of proof of legitimate filiation. Civil Code Articles 193-197. It provides for a system of legitimating children and for their

protection and care. Civil Code Articles 198-212, 238-245.

Perhaps the most important consideration of all is the institution of forced heirship, which prevails in Louisiana. Dainow, The Early Sources of Forced Heirship; Its History in Texas and Louisiana, 4 La. L. Rev. 42 (1941). With regard to forced heirship, status is all important. Pursuant to forced heirship, only certain legitimate relations may inherit. Civil Code Articles 1493-1495. They cannot be disinherited except for grave cause. Civil Code Article 1617. Louisiana has seen fit to protect and preserve the rights of these legitimate relations against encroachment. Where testacy is severely limited, by nature a system of family law based upon status is important.

The Civil Code evidences a policy of protecting the rights of legitimate relations in patrimony and caring for the legitimate relations of a person ahead of all others. The state requires that proof of legitimacy or status be established in certain very definite ways. The Legislature protects the legitimate relation against the claims of alleged illegitimates.

To allow persons, who may claim to be the offspring of persons deceased and to thereby claim legal rights, would invite chaos in a system where certainty is required. The problem of proof or disproof, as the case might be, would be difficult. The door to dishonest claims would be opened and the evidence needed to disprove claims of alleged illegitimates would doubtlessly lie with the deceased.

Louisiana has a unique legal system wherein rights in property are closely tied to legitimate family relations. Thus, it is submitted that the requirement of legitimacy in a wrongful death action is a part of a legitimate legislative purpose in a state where rights in property are so closely tied to familial status.

Louisiana has recognized the problem of illegitimacy. It has provided means for the illegitimate child to become legitimated. It has provided certain protections for the illegitimate. Louisiana has not turned a deaf ear to the rights of illegitimates, but has recognized the social interest in protecting illegitimates in a system where status is so important. It has provided the means whereby an illegitimate may obtain proper status.

However, Louisiana also has a social interest in preserving its legal system wherein rights in family and rights in property are so closely tied. The Legislature in protecting the illegitimate and giving him the opportunity of becoming legitimate has recognized its social duty. It has struck a balance of the competing social interests which is in no way discriminatory, unreasonable, or arbitrary.

**(c) Many States Require That A Beneficiary Be A Legitimate Relative In Order To Sue For The Wrongful Death Of Another Person.**

Some states permit only a legitimate child to sue for the wrongful death of a parent. Several states will not allow an illegitimate minor to sue for the

wrongful death of its mother. According to *Corpus Juris Secundum*, "where specified relatives of a decedent are indicated as beneficiaries, only the actual and legitimate relatives to whom the act applies are entitled to the benefits of the act. Such provisions do not embrace illegitimate kindred without express mention." 25A C.J.S. Death § 35. See also 22 Am. Jur. 2nd § 65.

Some states prohibit illegitimate children from recovering on account of the death of either parent. Other states prohibit the illegitimate from recovering only in the event of the demise of the father and allow a recovery for the death of the mother. Tennessee will permit a recovery for the demise of the mother but not of the father. TCA 20-607; *Dilworth vs. Tisdale Transfer and Storage Co.*, 354 S.W.2d 261 (Tenn. 1962).

Until recently, Georgia did not allow illegitimates to recover for the death of their parents. However, by statute, Georgia has now permitted an illegitimate child to recover for the death of its mother only. Georgia Code 74-204. Historically, Georgia did not permit illegitimates to recover for the death of either mother or father. *Brinkley vs. Dixie Construction Co.*, 205 Ga. 415, 54 S.E.2d 267 (note breadth of decision), Answer to certified question conformed to 54 S.E.2d 510 (1949); *Adams vs. Powell*, 67 Ga. 460, 21 S.E.2d 111 (1942). Maryland, historically, denied illegitimate any right of action for the death of a parent. But recently, by statute, Maryland has allowed an illegitimate child to sue for the death of its mother but

not of its father. Maryland Code Art. 67 § 4. *State for Use of Holt vs. Try, Inc.*, 152 A.2d 126 (Md. App. 1959); *Washington B. & A. R. Co. vs. State*, 136 Md. 103, 111 A. 164 (1920). South Carolina held the traditional view that no illegitimate child might sue. However, by statute, South Carolina now permits an illegitimate to sue for the wrongful death of its mother only. South Carolina Code 10:1953. *Smith vs. Atlantic Coast Line R. Co.*, 212 S.C. 332, 47 S.E. 2d 725 (1948). Texas permits an illegitimate to sue for the wrongful death of its mother but not of its father. Vernon's Ann. Tex. Civ. St. Arts. 4671, 4675; *Jones vs. SS Jessie Lykes*, 253 F.Supp. 368 (E.D.Tex., 1966); *Deathrudge vs. Fort Worth and D.C.R. Co.*, 154 S.W.2d 918; *Goss vs. Fanz*, 287 S.W.2d 289; *H. & S.A. Ry. Co. vs. Walker*, 106 S.W. 705.

By contrast there are a number of states such as Louisiana which by the breadth of their decisional law and the linking of the action for wrongful death to the laws of heirship would prohibit any illegitimate child from seeking recovery for the death of either parent. Pennsylvania would not allow an illegitimate child to sue for the death of either parent. 12 P.S. Pa. § 1601-1604; *Bullock vs. Sinclair Ref. Co.*, 160 F. Supp. 300 (E.D. Pa. 1958); *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); *Molz vs. Hansell*, 115 Pa. Super. 338, 175 A. 880 (1934); *Kemmerer vs. Reading Co.*, 64 D. & C. 433, 23 Lehigh L. J. 5. New Jersey it would appear would not allow an illegitimate to sue for the death of either father or mother. Statutes 3 A:4-7; *De Medio vs. Fort Norris Express Co.*,

71 N. J. Super. 190, 176 A.2d 550 (N.J. 1961); *Hammond vs. Penn. R. Co.*, 148 A.2d 515 (N.J. 1959).

Because of the link between inheritance laws and the action for wrongful death New York would not permit a suit by an illegitimate. *Hiser vs. Davis*, 194 N.Y.S. 275, 201 App. Div. 213 Aff'd. 234 N.Y. 300, 137 N.E. 596 (1922). In Indiana a suit would probably not be allowed. *McDonald vs. P.C.C. & St. Louis R. Co.*, 144 Ind. 43 N.E. 447 (1896) (Dicta).

Many states have not passed upon the issue. What their ruling is cannot be ascertained at this time. A number of states, of course, class the beneficiaries who may bring the action for wrongful death in accordance with the inheritance laws of that particular state. The rights of illegitimates to sue in these states are, of course, therefore, dependent upon the laws of inheritance of the particular state.

Under the Federal Employers' Liability Act, local law will determine whether or not a child may sue and if the local law bars an illegitimate, then such child will have no right of action under the Federal Employers' Liability Act. *Hammond vs. Pennsylvania R. Co.*, 54 N.J. Super. 149, 149 A.2d 515, rev'd on other grounds 31 N.J. 244, 156 A.2d 689. A claim by a Louisiana illegitimate under the Federal Tort Claims Act has been denied on account of illegitimacy. *Evans vs. United States*, 100 F. Supp. 5, (W.D. La. 1951). Congress has acquiesced in this view of the statute.

The classification of persons into legitimates and illegitimate is not an unreasonable classification when considered in the light of history. Many states require legitimacy with regard to their laws of inheritance. Other states will not permit illegitimate to recover for the death of their father. Some states will not permit illegitimate to recover for the death of either the mother or the father.

The laws with respect to the rights of illegitimate are in a state of flux. The fact that all states are not in accord with regard to the rights of illegitimate certainly establishes the reasonableness of the classification.

It is respectfully submitted that Louisiana does not stand alone and other States and legislatures are in accord with the Louisiana view that illegitimate may not sue for the wrongful death of a parent.

### **III. THE REQUIREMENT OF LEGITIMACY IS REASONABLY RELATED TO A PROPER LEGISLATIVE PURPOSE.**

The Wrongful Death Statute of Louisiana should not be read in isolation. It should be considered in the light of the over-all and overriding unsated major premises of the legal system. The state has evolved a system of legal institutions wherein rights in property in large part depend upon familial status. Article 2315 is part of the entire legal scheme of the state. It should not be considered *in vacuo*.

To permit illegitimates to recover under the Wrongful Death Statute would be to imperil the system of forced heirship so important in Louisiana's legal system. The action for wrongful death and the laws of descent and distribution have an unusual closeness. The thinking employed by appellant and the *amici* to justify allowing recovery for illegitimates could likewise be used to alter the system of forced heirship, community property and the relation between property and family. No title to real property in Louisiana could be certain where illegitimates had the same rights as legitimates.

Thus, when provisions of Article 2315 are considered in the light of the legal system prevailing in Louisiana, the requirement of legitimacy is reasonably related to a legislative purpose.

#### POINT IV.

#### THE EQUAL PROTECTION CLAUSE AND THE DUE PROCESS CLAUSE SHOULD NOT BECOME A VEHICLE WHEREBY THE NATIONAL GOVERNMENT MIGHT UNDERTAKE TO REGULATE MATTERS OF HISTORICAL STATE CONCERN ONLY.

The action for wrongful death in the United States is a matter which has been historically within the province of state governments. It is true that various federal statutes do regulate the action for wrongful death with respect to matters within the cognizance of the national government. However, the action for wrongful death and the content of the Common Law

and the Civil Law have been matters left to the states. The laws of inheritance and descent and distribution have been the exclusive concern of the states. Matters of family law in general have been reserved to the competence of state courts and legislatures. It is not the intention of the Fourteenth Amendment or for that matter the Civil Rights Act to become a vehicle whereby the national government might undertake to govern matters of historical, exclusive state cognizance. *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944); United States Constitution Amendment X.

**CONCLUSION.**

For the reasons stated above, the appeal herein should be dismissed and the judgment below affirmed.

Respectfully submitted,

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**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of January, 1968.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this .... day of January, 1968.

**WILLIAM A. PORTEOUS, JR.**

**LIBRARY**  
**SUPREME COURT, U. S.**

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IN THE  
**Supreme Court of the United States**  
October Term, 1967  
No. 508

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THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS  
CURIAE AND ACCOMPANYING BRIEF**

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IN THE  
**Supreme Court of the United States**

October Term, 1967

No. 508

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THELMA LEVY, in her capacity as administratrix of the succession of LOUISE LEVY and as the tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY, and AUSTIN LEVY.

—v.—

The STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D. and A.B.C. INSURANCE COMPANIES.

---

ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE***

*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.*

The undersigned as counsel for and on behalf of the NAACP Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent, respectfully move this Honorable Court for leave to file the accompanying brief as *Amicus Curiae*. Consent has been given by counsel for appellants and counsel for all parties on appellee's side, except the State of Louisiana which denied its consent. Documentation concerning such consent accompanies this brief.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., was organized 27 years ago for the purpose of securing equality before the law, without regard to race, for all

citizens. For many years, it has been the principal organization regularly supplying legal services to secure the civil rights of Negro citizens. As the majority of Negro citizens continued to relocate from the South to the North, and from rural to urban areas, they were confronted typically not with official state-sanctioned segregation, but with disabilities which attach to low-income status. Effective protection of the legal rights of Negro citizens therefore could only be secured by expanding the concern of the Fund to the rights of indigents including not only Negroes but members of all other groups that constitute the poor.

Under grant from the Ford Foundation, the Legal Defense Fund incorporated the National Office for the Rights of the Indigent (N.O.R.I.). The new organization is directing itself to those issues of law which have a substantial effect on the rights and protections accorded to poor persons. N.O.R.I. is engaging in legal research and litigation (by providing counsel for parties, as *amicus curiae*, or co-counsel with legal aid organizations) in cases in which rules of law may be established or interpreted to provide greater protection for the indigent.

The precise issue of this case is limited to whether five dependent illegitimate children will recover in tort for the wrongful death of their mother under a statute which would allow such recovery to legitimate children. More broadly, however, the question is whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law. Finally, the question is whether classification by the criterion of illegitimacy, which appears to be racially neutral on its face, is an instance of covert *racial discrimination* because it does in fact operate far more severely upon Negroes as a class than it does upon whites. This covert discrimina-

tion comes about by reason of the fact that disproportionately more Negro children than white children are born out of wedlock and a very high percentage of white illegitimate children are adopted, thereby achieving status under the Wrongful Death Act with regard to their adoptive parents, whereas nearly no Negro children find adoptive parents.

This case may have broad significance for urban populations as a whole and Negro communities in particular, within and outside of the State of Louisiana. Petitioners, therefore, wish to bring before this Court broader ramifications of this case which may not be of immediate importance to either of the parties.

WHEREFORE, petitioners pray that they be permitted to file the accompanying brief *amicus curiae* with this Court.

Respectfully submitted,

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ON APPEAL FROM THE SUPREME COURT OF LOUISIANA

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**BRIEF *AMICUS CURIAE***

For the NAACP Legal Defense and Educational Fund, Inc. and the National Office for the Rights of the Indigent.

**Statement of Interest**

This brief *amicus curiae* is submitted with the consent of counsel for appellant and counsel for all parties on appellee's side, except the State of Louisiana which denied its consent. Documentation concerning such consent accompanies this brief.

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organization regularly supplying legal services to secure the civil rights of Negro citizens. As the majority of Negro citizens continued to relocate from the South to the North, and from rural to urban areas, they were confronted typically not with official state-sanctioned segregation, but with disabilities which attach to low-income status. Effective protection of the legal rights of Negro citizens therefore could only be secured by expanding the concern of the Fund to the rights of indigents including not only Negroes but members of all other groups that constitute the poor.

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The precise issue of this case is limited to whether five dependent illegitimate children will recover in tort for the wrongful death of their mother under a statute which would allow such recovery to legitimate children. More broadly, however, the question is whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law. Finally, the question is whether classification by the criterion of illegitimacy, which appears to be racially neutral on its face, operates far more severely upon Negroes as a class than it does upon whites. This covert discrimination comes about by reason of the fact that disproportionately more Negro children than white children are born out of wedlock and a very

high percentage of white illegitimate children are adopted, thereby achieving status under the Wrongful Death Act with regard to their adoptive parents, whereas nearly no Negro children find adoptive parents.

This case will have broad significance for urban populations as a whole and Negro communities in particular, within and outside of the State of Louisiana. Petitioners, therefore, wish to bring before this Court broader ramifications of this case which may not be of immediate importance to either of the parties.

#### **Opinions Below — Statute Involved**

The opinions below and the statute involved are set out in the brief of the appellants.

#### **Question Presented**

Whether, consonant with the Fourteenth Amendment to the United States Constitution, the criterion of *illegitimacy* may be used as the basis for classification under a state "welfare" law.

More precisely, the question is whether the Wrongful Death Act of Louisiana, Civil Code Article 2315, as interpreted by the Louisiana courts to deny to illegitimate children, but to allow to legitimate children, an action for the wrongful death of their mother, solely on the basis of birth in or out of wedlock, is unconstitutional and therefore invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States.

### Statement of the Case

The summary that follows is based on the Statement of the Case and Opinion Below in appellant's Jurisdictional Statement, pp. 4-6.

Appellant brought this action under La. Civ. Code art. 2315 on behalf of the five minor children of the late Louise Levy for her wrongful death. The defendants were the State of Louisiana, through the Charity Hospital of New Orleans Board of Administrators and W. J. Wing, M.D., and the ABC Insurance Companies, later designated as the Interstate Fire and Casualty Company (R. 5-9, 37).

The Third Supplemental and Amending Petition, whose allegations must be taken as true for the purposes of this appeal, stated that the five illegitimate children of Louise Levy lived with her, and she treated them as well as any mother would treat her legitimate children. She worked as a domestic servant to support them and either took them or had them taken to Catholic Mass every Sunday. In addition, she had them enrolled in a parochial school at her own expense, even though she could have sent them to the free public school (R. 50-52).

As alleged in the petition, on March 12, 1964, Louise Levy came to the Charity Hospital in New Orleans with symptoms of tiredness, dizziness, weakness, chest pain and slowness of breath. Dr. Wing, to whom she was assigned, purportedly examined her, but failed to take her blood pressure, make a proper check of her eyes or conduct any other test, such as urinalysis, which would have revealed her condition. He then sent the patient home with tonic and tranquilizers. She returned on March 19 with severe symptoms. Dr. Wing merely looked at her, told her that she was not taking the medicine, and made an appointment for her to see a psychiatrist on May 14. On March 22 she

was brought to the hospital in a comatose condition, when adequate examination resulted in the correct diagnosis of hypertension uremia. She died on March 29, 1964 (R. 5-9).

Dr. Wing and the Interstate Fire and Casualty Company moved to dismiss the petition on the grounds that petitioner had not qualified as tutrix, and that Article 2315 allowed no cause or right of action as to illegitimate (R. 20-21). The procedural issue was cleared by appellant's qualification as tutrix in separate proceedings. The District Court then rendered judgment in favor of the defendants and the suit was dismissed (R. 66-67). On appeal, the Court of Appeal affirmed on the ground that illegitimate children have no cause of action for the wrongful death of their mother and stated that "[d]enying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." The Court of Appeal specifically rejected appellant's claim that the denial of a cause of action under Article 2315 deprived the children of due process and equal protection under the Fourteenth Amendment (R. 112-115): "Since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color, or creed, we can find no basis for the contention of unconstitutionality, and can find no jurisprudence of our courts to such effect." Appellant petitioned the Supreme Court of Louisiana for a writ of *certiorari* on constitutional grounds. The Supreme Court denied the writ, finding "no error of law in the judgment of the Court of Appeal" (R. 116). This Court has noted probable jurisdiction. *Levy v. Louisiana*, — U.S. —, 88 S.Ct. 290 (1967).

## Summary of Argument

"Distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943); *Loving v. Virginia*, 388 U.S. 1, 11 (1967). Whether discrimination on the basis of ancestry rests upon the parents' color, creed, nationality, religion or marital status, it offends the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution.

Furthermore, the Louisiana statute under review discriminates on the basis of race. As developed in detail below, 95.8 percent of all persons affected by discrimination against illegitimates under the statute are Negroes. This means that, for practical purposes, the classification of illegitimacy as used under the Louisiana Wrongful Death Act is a euphemism for discrimination against Negroes.

The demand of the Fourteenth Amendment applies with particular force to a state "welfare" law, such as the Louisiana Wrongful Death Act here under review. Not only is there no rational regulatory purpose which justifies the discrimination against illegitimates imposed under the Wrongful Death Act, but the very purpose of the Wrongful Death Act, which is to provide compensation for the tortious loss of support, is thwarted by the capricious denial of recovery to the illegitimate.

The precise issue of the case is narrowly limited to the right of dependent illegitimate children to recover for the death of their mother under a statute which would allow such recovery to legitimate as well as adoptive children. However, the broader implications of this case point to a whole range of anachronistic discriminations imposed by

our legal system on the person of illegitimate birth.<sup>1</sup> As shown by the statistics on illegitimate birth rates, this discrimination hits hardest in the poorest groups of our society, it is imposed most severely on those least able to afford or combat it.

## ARGUMENT

### I.

#### Denial of Equal Protection.

The Equal Protection Clause does not forbid "unequal laws" and does not require every law to be equally applicable to all individuals. *Barbier v. Connolly*, 113 U.S. 27, 31-32 (1885). Of necessity, classification must be permitted; otherwise there could be no meaningful legislation. The question that this Court has asked under the Fourteenth Amendment is whether a given piece of legislation operates "equally" upon all members of a group that is defined reasonably and in terms of a proper purpose.

To show that legislation discriminating against the illegitimate applies equally to all illegitimates, regardless of race, color, nationality, sex or creed proves nothing concerning the validity of such legislation. Cf. *Loving v. Virginia*, *supra*. This disposes of the fundamental misunderstanding of the meaning of the Fourteenth Amendment expressed in the Louisiana court's opinion here under review, to the effect that "since there is no discrimination in the denial of the right of illegitimate children to recover based on race, color or creed, we can find no basis for the conten-

<sup>1</sup> See, generally, Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 Tex. L. Rev. 829 (1966); Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477 (1967); Krause, *The Non-Marital Child—New Conceptions for the Law of Unlawfulness*, 1 Fam. L. Q. 1 (June, 1967).

tion of unconstitutionality.<sup>2</sup> This holding of the Louisiana Court begged the question, which goes to the propriety of the criterion of *illegitimacy*.

Applying the equal protection test to the criterion of illegitimacy, it follows that state action denying to the illegitimate rights that are granted to those of legitimate birth is acceptable only if it is related to a proper public concern with respect to which legitimate and illegitimate children are *not* situated similarly. In order to test for equal protection purposes a law regulating the status of the illegitimate, its legislative purpose must be defined and evaluated. Long ago, in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911), this Court stated its traditional reluctance to interfere with state law where the equal protection clause is invoked to protect economic interests. While this reluctance has been likened to a presumption of constitutionality, this presumption is reversed where the "basic civil rights of man" are at issue. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 669-70 (1966); *McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 666, 667 (1963); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1962). It is beyond question that a child's right to a familial relationship with his mother is more akin to a "fundamental right and liberty" or a "basic civil right of man" than to a mere economic interest. Although money is involved, the illegitimate's claim actually goes further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe"<sup>2</sup> and in which recovery in tort is granted for a false allegation of illegiti-

<sup>2</sup> "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, *Emotional Trauma Resulting From Illegitimate Birth*, 54 ARCHIVES OF NEUROLOGY AND PSYCHIATRY 381 (1945).

macy.<sup>3</sup> Indeed, the psychological effect of the stigma of bastardy upon its victim<sup>4</sup> seems entirely comparable to the damaging psychological effects upon the victims of racial discrimination.

<sup>3</sup> The following is an abbreviated list of defamatory epithets compiled in a leading textbook on torts: "... immoral or unchaste, or 'queer' . . . a coward, a drunkard, a hypocrite, a liar, a scoundrel, a crook, a scandal-monger, an anarchist, a skunk, a bastard, a eunuch . . . because all of these things obviously tend to affect the esteem in which he is held by his neighbors." Prosser, *Torts* 757-58 (3rd ed. 1964). Of course, quite aside from the neighbors' esteem, an allegation of bastardy may be a serious matter in that it may dispute eligibility to inherit.

<sup>4</sup> Jenkins, An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children, 64 A.M. J. SOCIOLOGY 169 (1958), in which the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the (unfortunately rather small) sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

"Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences. . . .

The second discernible pattern was that the older groups of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory." *Id.* at 173.

## II.

**Evaluation of the Relationship Between the Discrimination Against Illegitimates Imposed Under the Louisiana Wrongful Death Act and the Act's Regulatory Purposes.**

Discrimination against the illegitimate is rooted so deeply in our culture that legislative enactments on illegitimacy are generally silent as to legislative purpose. Accordingly, the Louisiana statute does not reveal a reason why illegitimates should be excluded from its beneficial operation. Indeed, the Louisiana statute itself does not refer to illegitimate children at all, but has been construed by the Louisiana courts to harbor this discrimination in the reference to "children," which is specifically defined to include adopted children. The history and origin of the line of Louisiana decisions that imposed this discrimination is reviewed and analyzed below. First, however, we should consider the argument employed by the Louisiana Court in the decision under review to the effect that "Denying illegitimate children the right to recover in such a case is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock."<sup>5</sup> This argument is bogus.

There is of course no question that the state may properly regulate many aspects of sexual conduct. However, even if the purpose of discouraging sexual intercourse outside of marriage is entirely valid, a connection must be established between this purpose and the statute, between the status of the illegitimate child under the Wrongful Death Act and his mother's conduct. The only connection, if one exists, lies in the expectation that potential parents will be so concerned about the treatment that awaits their

<sup>5</sup> See Statement of the Case, *supra*.

illegitimate child at the hands of the law that they will refrain from illicit conduct. First, a causal connection seems to be lacking because the rapidly rising rate of illegitimate births<sup>6</sup> indicates that laws discriminating against illegitimate children do not affect their parents' sexual conduct.

Second, and more importantly, this supposed rationale raises the question *whether a law may properly penalize one in order to evoke guilt feelings in another whose conduct is to be affected*. Merely to ask the question in this form is to answer it. "In a series of decisions this Court has held that even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).<sup>7</sup> If the state wishes to discourage casual unions, it should do so directly,

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<sup>6</sup> U. S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 47, 51 (1965) shows a total of 4,098,000 live births, and 259,400 illegitimate live births for 1963. See also Campbell and Cowhig, *The Incidence of Illegitimacy in the United States*, 5 Welfare in Review 1, 4 (No. 5, May 1967), who show the following table:

	1940	1957	1965
Number of illegitimate births	89,500	201,700	291,200
Illegitimate births per 1,000 unmarried women 15-44 years old (illegitimacy rate)	7.1	20.9	23.4
Illegitimate births per 1,000 births (illegitimacy ratio)	37.9	47.4	77.4

<sup>7</sup> Cf. *Apteker v. Secretary of State*, 378 U.S. 500, 508 (1964) (citations omitted): "It is a familiar and basic principle, recently reaffirmed in *NAACP v. Alabama* . . . , that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

as for example, by punishing fornication<sup>8</sup> or by providing incentives for marriage,<sup>9</sup> rather than by penalizing a group that cannot prevent the mischief against which the law is directed. This Court has held that the status of parents may not be the basis for placing burdens and disabilities

<sup>8</sup> It would not do to punish the parents for the illegitimate birth of the child because, whether the punishment consisted of a fine, a jail sentence, or the denial of welfare benefits, the child ultimately bears much or most of the burden of such punishment. Consider the Louisiana picture in this regard: Since 1960, LA. REV. STAT. 14:79.2 provides as follows: "Conceiving and giving birth to two or more illegitimate children is hereby declared to be a crime. Both the father and the mother of such children shall be equally guilty of the commission of this crime. Each such birth shall be a separate violation hereof. A birth certificate showing a child to be illegitimate shall be *prima facie* proof of that fact. Whoever commits the crime of conceiving and giving birth to two or more illegitimate children shall be fined not more than one thousand dollars, or imprisoned for not more than one year, or both." This type of legislation is not limited to Louisiana, but has found its way into other Southern states. Cf. Miss. CODE ANN. § 2018.6.1 (1964 Supp.). Also in 1960, Louisiana attempted to deny ADC benefits to each person "who is living with his or her mother if the mother has had an illegitimate child after a check has been received from the welfare department, unless and until proof satisfactory to the parish board of public welfare has been presented showing that the mother has ceased illicit relationships and is maintaining a suitable home for the child or children." LA. ACTS 1960, No. 251 § 1 at 527. In 1961, this "suitable home" requirement was ruled inconsistent with controlling Federal welfare laws. See Bell, *AID TO DEPENDENT CHILDREN* 142-48 (1965); Dorsen, ed., *Poverty, Civil Liberties, and Civil Rights: A Symposium*, at 331. Accordingly, the Louisiana statute was revised to deny benefits only to those illegitimate children whose mother "is the mother of two or more older illegitimate children." LA. REV. STAT. 46:223.

<sup>9</sup> In the higher income brackets, the tax law presently provides some such incentive in the form of exemptions and income-splitting privileges. In the low-income brackets, however, the situation often is reversed, and many welfare arrangements actually *discourage* marriage and legitimacy. For example, a widow who remarries often will lose survivors or pension benefits derived through her first husband. Analogous problems arise under the ADC programs. In the lowest income groups the widespread unavailability of legal aid services that include family matters, such as divorce and legitimization, heavily contributes to the incidence of illegitimacy. Dorsen, ed., *Poverty, Civil Liberties, and Civil Rights: A Symposium, supra*; cf. Mr. Justice Douglas, dissenting, in *Hackin v. Arizona*, — U.S. —, 88 S.Ct. 325, 327-32 (1967).

on a child. *Oyama v. California*, 332 U.S. 633 (1948). Certainly, it follows that wrongful, perhaps criminal, acts by the mother here, can not justify the particular disability challenged by petitioners.

A careful search fails to disclose any other potential regulatory purpose that might support the statute. On the contrary, as will be discussed fully below, the evidence points in the direction of tragicomic historical accident. Thus, there is in illegitimacy cases no question concerning the mother's identity which is established by the fact of birth with the same certainty whether the birth takes place within or out of wedlock. If certain types of discrimination against the illegitimate may unpersuasively be supported on the ground that this protects the family as a moral, social institution,<sup>10</sup> this argument fails wholly if there is no family involved. In the case of an action for the wrongful death of the mother, there is by definition no family to protect. Nor might one suppose that the illegitimate mother loved her children less by reason of their illegitimate status. Even if this were so, there would be no relevant relation between the mother's love and her children's right to recover from a tortfeasor for their mother's wrongful death. If these arguments seem far afield, no better arguments support the discrimination imposed under the Louisiana statute.

On the contrary, not only are there no rational reasons in favor of discriminating against illegitimates under the Louisiana statute, but good reasons favor the opposite result. What indeed is the purpose of the Wrongful Death Act? Its purpose is to rectify the injustice imposed by the old common law which held that tort actions died with the victim and which denied a person dependent on the

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<sup>10</sup> See Krause, *Equal Protection for the Illegitimate*, *supra* at 492-95.

victim to recovery from the tortfeasor for his loss of support.

This benefit inures not only to the person entitled to recover, but also relieves the public of a potential welfare burden—quite aside from the policy questions involved in letting a tortfeasor go free. It needs no elaboration that the question of the legitimacy status of children living with, dependent on and entitled to support from their mother who met a tortious death is wholly irrelevant with respect to these purposes. Indeed, the purposes of the statute under review actually would be served better if the action of the illegitimate claimant were allowed. In this connection it should be noted again that the Louisiana statute does *not* on its face discriminate against illegitimates, but that the courts have superimposed this interpretation upon the statute. It is significant that Louisiana's Workmen's Compensation Act, which is a similar "welfare" statute also intended to compensate for loss of support, has been interpreted to allow illegitimate children to recover for the death of even their *father*, if dependent on him and living in his household.<sup>11</sup>

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<sup>11</sup> LA. REV. STAT. § 23:1021(3). (1964) defines child as not including an illegitimate child unless acknowledged. However, § 23:1253 has been interpreted to allow the illegitimate child to recover as a dependent if living in the workman's household. The distinction is that since the illegitimate does not qualify under § 23:1021(3), he must prove his *dependency* upon the workman, whereas the legitimate who qualifies under § 23:1021(3) merely must prove that he lived with the workman from which fact his dependency would be presumed. In practical effect, this distinction is one without serious difference. See *Note*, 20 TUL. L. REV. 145 (1945). The Wrongful Death Act discrimination against the illegitimate met with the non-discriminatory interpretation of the Louisiana Workmen's Compensation Act in *Board of Comm'r's. v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1954). Plaintiff had been the employer of deceased and sued to recover indemnification from the tortfeasor after being held liable to the illegitimate child of the deceased under the Workmen's Compensation Act. Defendant contended that the

In its 1965 amendments to the Social Security Act, Congress recognized that the purpose of welfare statutes is thwarted by discrimination against illegitimates and ended previous reliance on state law definitions of the term "child" and similar operative words which often had resulted in discrimination against illegitimates.<sup>12</sup>

### III.

#### **Historical Accident—The True Reason for the Discriminatory Interpretation of the Louisiana Wrongful Death Act.**

How then may it be explained that the Louisiana courts have consistently interpreted the Wrongful Death Act against the illegitimate? Instead of being supported by a purpose that is rational in the light of this century, the basis for the discriminatory interpretation of the Louisiana statute lies in its history. The earliest case employing the rule was *Lynch v. Knopp*, 118 La. 611, 43 So. 151 (1907), in which a mother of an illegitimate child was denied recovery for the wrongful death of her child. The court stressed the

employer could not recover because the illegitimate child had no action under § 2315. The court acknowledged that the child would have no action under § 2315, but held that this did not bar the employer's suit against the defendant, because to obtain indemnification, under the Workmen's Compensation Act, the employer asserts the cause of action that arose originally in favor of the *employee* rather than that of the beneficiary under the Wrongful Death Act.

<sup>12</sup> In essence, the new section (64 Stat. 492 (1950), as amended, 42 U.S.C. § 416(h)(3) (1965)) provides that:

"an applicant will be considered the child of the worker if the worker (1) has acknowledged in writing that he is the child's father; (2) has been decreed by a court to be the child's father; (3) has been ordered by a court to contribute to the support of the child because he is the child's father; or (4) is shown by other evidence satisfactory to the Secretary to be the child's father and has been living with or contributing to the support of the child." S. REP. No. 404, 89th Cong., 1st Sess. 267 (1965).

legal distinction between the inheritance rights of legitimate and illegitimate children and noted that, since the statute is in derogation of the common law (at common law the action of the deceased would not survive), it must be construed strictly and the term "child" limited to a legitimate child. This interpretation of the statute continues today, but now the Louisiana courts no longer search for reasons and mechanically apply the rule excluding illegitimates from the benefit provided under the Wrongful Death Act.<sup>13</sup>

Ironically, the French law after which the Louisiana Code was patterned not only had no equivalent to the common law rule under which tort actions died with the victim, but the basic tort provision of the French Code had been specifically interpreted to allow the tort right of action to survive the death of the victim *prior* to the adoption of the identical tort provision in Louisiana.<sup>14</sup> *Erhard v. Utwiller* [1809-1811], S. Jur. II 223 (Cour d'appel, Colmar, March 3, 1810); *Rolland v. Gosse* [1815-18], S. Jur. I 540 (Cass. civ. Nov. 5, 1818). For no discernible reason the Louisiana court rejected the French interpretation and instead adopted the common law view, holding that without a specific statute no action could lie for wrongful death. *Hubgh v. N.O. & C.R.R.*, 23 La. (6 La.

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<sup>13</sup> *Vaughan v. Dalton-Lard Lumber Co.*, 119 La. 61, 43 So. 926 (1907); *Landry v. American Creosote Works*, 119 La. 231, 43 So. 1016 (1907); *Sebastris Youchican v. Texas & P. Ry.*, 147 La. 1080, 86 So. 551 (1920); *Green v. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Navarrette v. Joseph Laughlin, Inc.*, 20 So. 2d 313 (La. Ct. App. 1944), reversed on other grounds, 209 La. 417, 24 So. 2d 672 (1946); *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1945); *Evans v. United States*, 100 F. Supp. 5 (W.D. La. 1951); *Board of Comm'r's v. City of New Orleans*, *supra* n. 11; *Jackson v. Lindlom*, 84 So. 2d 101 (La. Ct. App. 1955); *Benjamin v. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La. 1965); *Gloni v. American Guaranty & Liability Insurance Company et al.*, 379 F.2d 545 (5th Cir. 1967).

<sup>14</sup> The basic French torts provision, CODE CIVIL art. 1382, was taken over into Louisiana law as the first sentence of LA. CIV. CODE art. 2315.

Ann.) 495, 496-97, 54 Am. Dec. 565, 567 (1851). In response to this interpretation, Louisiana added to its law the predecessor statute to its current Wrongful Death Act. See Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 TUL. L. REV. 201, 221 (1932). But French law indirectly came back in the interpretation that was later given the Wrongful Death Act which discriminated against the illegitimate with regard to his relation with his natural *mother*. While a number of wrongful death statutes in other states discriminate against illegitimates insofar as recovery for the wrongful death of the *father* is concerned, the illegitimate child's relation to its *mother* usually is legally complete upon birth. Discrimination with respect to the mother's relation to her child is unique to Louisiana law,<sup>15</sup> and apparently, came to Louisiana from French law. While nearly all other legal systems base the legal relationship between mother and illegitimate child on the fact of birth, French and Louisiana law to this day require that maternity be formally established by the mother's acknowledgment or by a maternity suit. See Savatier, *L'évolution de la condition juridique des enfants naturels en droit français* 37, 41-42 in Dabin, *LE STATUT JURIDIQUE DE L'ENFANT NATURE* (1965). Lasok, *Legitimation, Recognition and Affiliation Proceedings*, 10 INT. & COMP. L. Q. 123, 127-28 (1961); Cf. LA. CIV. CODE arts. 203, 241 (1) (Slovenko 1961).<sup>16</sup> The confusion is total because French law itself does

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<sup>15</sup> The Georgia Wrongful Death Act was amended in 1960 to allow a dependent, illegitimate child to recover for the wrongful death of his mother. GA. STAT. ANN. § 105-1306 (Supp. 1966).

<sup>16</sup> The peculiar French requirement of formal *maternal* acknowledgment dates from the time of Henri IV who, to discourage a wide-spread practice of child abandonment and substitution, ordered that maternity be specifically established. See Miffler-Freienfels in 2 VERHANDLUNGEN DES VIERUNDVIERZIGSTEN DEUTSCHEN JURISTENTAGES, Sitzungsberichte at C105 (1964).

allow the illegitimate to recover for the wrongful death of his mother and even his father. *Min. publ. et cons. Scherriff v. Sansen* [1954] D. Jur. 176 (Cour d'appel, Douai, Dec. 10, 1953); *Beinheir Ben M'Bark et Cie v. Dame Bousquet* [1954], D. Jur. 777 (Cour d'appel, Rabat, Nov. 12, 1954). See 1 Mazeaud and Tunc, *TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE* 372 *et seq.* (5th ed. 1957).

## IV.

### Racial Discrimination.

In addition to the overt discrimination on the basis of the criterion of illegitimacy, the Louisiana Wrongful Death Act covertly discriminates on the basis of race. While the statute employs no racial criterion on its face, it operates far more severely upon Négroes as a class than it does upon whites. This covert discrimination comes about in two ways. First, disproportionately more Negro children than white children are born out of wedlock.<sup>17</sup>

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<sup>17</sup> Nationally, in 1963, the Vital Statistics Division of the Public Health Service, U.S. Department of Health, Education and Welfare, estimated that the white illegitimacy rate was 30.7 per 1,000 live births; the non-white rate was 235.9. (While the non-white classification includes Orientals, Indians and Negroes, Negroes so predominate numerically (more than 90%) that the non-white classification reflects the Negro figure with reasonable accuracy. U.S. Bureau of the Census, *Statistical Abstract of the United States* 28 (1967).) See United States Department of Labor, Office of Policy Planning and Research, *The Negro Family The Case for National Action* (hereafter referred to as *The Moynihan Report*) 8-9, 59. By 1965, the white rate was 39.6 and the Negro rate was 263.2 per thousand live births. *U.S. News and World Report*, Oct. 2, 1967 at 84. These figures drastically understate the problem, for among the impoverished urban Negroes the illegitimacy rate has been rising much faster than it has risen nationally. In the District of Columbia, the illegitimacy rate for non-whites grew from 21.8 percent in 1950, to 29.5 percent in 1964. *The Moynihan Report* at 9. In impoverished areas of the District the 1963 rate was 38 percent. *Id.* at 70. In Harlem, the

In *Louisiana* in 1965, the U.S. Department of Health, Education and Welfare reported, 8,276 illegitimate children were born to Negroes and 1,158 were born to whites. *U.S. News and World Report*, Oct. 2, 1967 at 85.

The second and even more important reason that makes the statute disproportionately more burdensome for Negroes than for whites is that a high percentage (70%) of white illegitimate children are adopted and thereby achieve status under the Wrongful Death Act, at least with regard to their adoptive parents, whereas very few (3-5%) Negro illegitimates find adoptive parents.<sup>18</sup>

*Griffin v. County School Board*, 377 U.S. 218 (1964), involved a comparable point because, on its face, the closing of the public schools of Prince Edward County to white and Negro children was not discriminatory. However, this Court unanimously held the school closing "to deny colored students equal protection of the laws" because "(c)losing Prince Edward's schools bears more heavily on Negro children in Prince Edward County since white children there have accredited private schools which they can attend while colored children until very recently have had no available private schools, and even the school they now attend is a temporary expedient." If the uneven numerical incidence of illegitimacy among Negroes and whites in itself pro-

non-white illegitimacy rate in 1963 was more than 43 percent. *Id.* at 19. In some areas of Chicago, the illegitimacy rate stands at 38 percent. *Champaign-Urbana [Illinois] News Gazette*, Feb. 14, 1966, p. 13.

<sup>18</sup> "Of an estimated 2.5 million surviving children registered as illegitimate at birth from 1940 through 1957, 1 million were white and 1.5 million, nonwhite. . . . Possibly as many as 70 percent of all white illegitimate children are given for adoption, but only between 3 and 5 percent of the nonwhite illegitimate children are adopted. Some children are legitimated through marriage of their parents. Although no estimate is available the number is believed to be too small to affect the percentage distribution." U. S. Department of Health, Education and Welfare, *Illegitimacy and its Impact on the Aid to Dependent Children Program* 35-36 (1960).

vides a reasonable analogy, the fact that that adoption facilities are open and widely utilized by white illegitimates improves the analogy. The analogy is perfected by a Louisiana statute which forbids interracial adoption and thereby closes to Negroes, solely on the ground of race, one method of escape from the discrimination under the Wrongful Death Act. *La. Rev. Stat.* 9:422. The combination of this statute with the wrongful death statute in question here denies equal protection of the laws in violation of the Fourteenth Amendment.

Applying the national percentage on white adoptions (70%) and non-white adoptions (4%) to the 1965 Louisiana illegitimacy figures (1,158 white, 8,276 Negro); only 347 white children remain unadopted, whereas 7,945 Negro children remain unadopted. *This means that 95.8 percent of all persons affected by the operation of the Louisiana Wrongful Death Act are Negroes.* For all practical purposes this means that the criterion of *illegitimacy* as used under the Louisiana Wrongful Death Act is synonymous with a *racial classification*.

It is not contended, of course, that the construction of the Louisiana statute against illegitimates, at least in its inception, had a racially discriminatory intent. Nor is it contended that a statute which happens to fall most heavily upon one particular group is for that reason alone unconstitutional. However, this Court need not ignore the fact that Louisiana is a Southern state with a long history of racial discrimination and that the operation of the Wrongful Death Act, if accidentally, fits perfectly into a pattern of legislation which often is only a thinly disguised cover for racial discrimination. For example, in 1960 Louisiana amended its constitution to deny the right to vote in federal and state elections for a period of five

years after the birth of an illegitimate child, to both parents of an illegitimate child. Louisiana Constitution, art. 8, §§1(5), (6).<sup>19</sup>

## V.

## Due Process.

The interpretation given the Wrongful Death Act by the Louisiana courts also violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Much of the above discussion under the Equal Protection Clause and specifically the inquiry into the purposes of the Louisiana statute, is applicable under the Due Process Clause as well. Suffice it to add here that if *Loving v. Virginia, supra*, held that the miscegenation statute was invalid under the Due Process Clause because "the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," a child's right to a legally recognized relationship with his own mother should be considered a still more "basic civil right of man" than the right to marry. See *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965).

In this connection, it is relevant to observe how other civilized nations approach the problems created by centuries of discrimination imposed on the person of illegitimate birth. Cf. *Wolf v. Colorado*, 338 U.S. 25 (1948).

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<sup>19</sup> See *supra*, note 8. Cf. *Willie Earl Carthan v. State Board of Education*, Civil Action No. 3814, United States District Court, Southern District of Mississippi, Jackson, Mississippi Division, in which a temporary injunction was issued against the enforcement of a state statute which, by assessing a tuition fee, sought to exclude from the public school system children who were not living with their natural parents. This was disproportionately oppressive of the Negro community because considerable numbers of parents had migrated to Northern communities and had left their children behind with relatives.

The illegitimate's demand for a measure of equality increasingly is being recognized as a basic human right. In January, 1967, a subcommission of the Commission on Human Rights of the United Nations adopted a statement on "General Principles on Equality and Non-Discrimination in Respect of Persons Born Out of Wedlock" which demands that "every person, once his filiation has been established, shall have the same legal status as a person born in wedlock."<sup>20</sup> This effort in the United Nations reflects active and extensive movements toward reform of the law of illegitimacy that are under way in many countries. For example, the Scandinavian countries have long granted substantially equal rights to the illegitimate.<sup>21</sup> In 1915, Norwegian law set the pace by establishing substantial equality for the illegitimate child in his legal relationship to his mother *and* father. The early statute was superseded by the Norwegian Law of December 21, 1956, concerning children born out of wedlock which abolished nearly all remaining legal distinctions between legitimate and illegitimate children.<sup>22</sup> [1956, Part 2] *Norsk Lovtidend* 882, No. 10. The Danish Law of May 18, 1960, concerning the rights of children broadly deals with the rights of legitimate and illegitimate children and does *not* distinguish between them.<sup>23</sup> Among other things, it provides an equal right of support and very effective means to ascertain

<sup>20</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, United Nations Economic and Social Council, *Study of Discrimination against Persons Born out of Wedlock: General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock*, U.N. Doc. E/CN. 4 Sub. 2/L. 453 (13 Jan. 1967).

<sup>21</sup> See Danish Committee on Comparative Law, DANISH AND NORWEGIAN LAW 55 (1963).

<sup>22</sup> See Arnholm, *New Norwegian Legislation Relating to Parents and Children*, in 3 SCANDINAVIAN STUDIES IN LAW 11, 12-20 (1959).

<sup>23</sup> See Marcus, *Das neue dänische Kindergesetz*, 26 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 51 (1966).

paternity. [1960, Part A] *Lovtidende* 603, No. 200. The Swedish Law of June 10, 1949, concerning the legal situation of parents did not go quite as far, but does provide an equal right of support for the illegitimate child. [1949] *Förfatningssamling* 729, No. 381.

The 1949 Constitution of West Germany contains the following provision: "Illegitimate children shall, through legislation be given the same conditions for their physical and spiritual development and their position in society as legitimate children." German Fed. Rep. Const. art. VI (5). To comply with this constitutional requirement the German Ministry of Justice has drafted a reform proposal which presently is under active consideration.<sup>24</sup> *Referentenentwurf eines Gesetzes über die rechtliche Stellung der unehelichen Kinder* (Unehelichengesetz) Bundesjustizministerium, Bonn 1966. Similarly, the Austrian government has proposed a bill that would realize substantial equality.<sup>25</sup> *Regierungsentwurf eines Bundesgesetzes über die Neuordnung der Rechtsstellung des unehelichen Kindes*, dated June 16, 1965, No. 763 der Beilage zu den stenographischen Protokollen des Nationalrates X.GP. In Switzerland the report of an official committee proposes substantially improved means of ascertaining paternity of illegitimates and offers inheritance rights with respect to the father.<sup>26</sup> *Bericht der Studienkommission für die Teilrevision des Familienrechts*

<sup>24</sup> See Knöpfel, *Der Referentenentwurf eines Gesetzes über die rechtliche Stellung der unehelichen Kinder*, 13 *ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT* 273 (1966); Müller-Freienfels, *Das Recht des ausserehelichen Kindes und seine Reform*, in von Caemmerer and Zweigert, *DEUTSCHE LANDESREFERATE ZUM VII. INTERNATIONALEN KONGRESS FÜR RECHTSVERGLEICHUNG IN UPPSALA 1966* 149 (1967).

<sup>25</sup> See Gschritzer, *Grundsätzliches zur Neuordnung der Rechtsstellung des unehelichen Kindes*, 88 *JURISTISCHE BLÄTTER* 393 (1966).

<sup>26</sup> See Hegnauer, *Die Revision der Gesetzgebung ueber das aussereheliche Kindesverhältnis*, New Series 84 Part 2 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 1, 36 (1965).

(*Ausserehelichen-, Adoptions - und Ehegütterrecht*) erstattet dem Eidgenössischen Justiz - und Polizeidepartment am 6/13/1962 (mimeographed).

In *Great Britain*, the *Report of the Committee on the Law of Succession in Relation to Illegitimate Persons*, Cmnd. 3051, London 1966, proposes a broad reform of the illegitimate child's right of inheritance that would grant a right of intestate succession with regard to the *father* as well as the mother.<sup>27</sup> In *New Zealand*, the position of the illegitimate child, at least in the area of public law, has been made largely equivalent to that of the legitimate child. 4 Robson, *BRITISH COMMONWEALTH, New Zealand* 333 (1954).

Many countries of Latin America have provisions for legal equality of legitimate and illegitimate children. For example, the *Bolivian* constitution provides that "inequalities among children are not recognized; they all have the same rights and duties." Constitution art. 183 (Pan American Union, *Constitution of the Republic of Bolivia 1961* (1963)). *Ecuador's* constitution gives the illegitimate rights of support and inheritance. Constitution art. 164 (Pan American Union, *Constitution of the Republic of Ecuador 1946* (1961)). *Guatemala's* constitution provides that "(a)ll children are equal before the law and have identical rights" and that "(t)he law shall establish the means of proof in investigating paternity." Constitution art. 86 (2), (3) (Pan American Union, *Constitution of the Republic of Guatemala 1965* (1966)). *Panama's* constitution provides that "Parents have the same duties toward children born out of wedlock as toward those born in it. All children are equal before

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<sup>27</sup> See Lasok, *Family Law Reform in England*, 8 WM. & MARY L. REV. 589, 622 (1967); Stone, *Report of the Committee on the Law of Succession in Relations to Illegitimate Persons*, 30 MODERN LAW REVIEW 552 (1967).

the law and have the same hereditary rights in intestate succession." Constitution art. 58 (Pan American Union, *Constitution of the Republic of Panama 1946* (1962)). Uruguay's constitution contains the following provision: "Parents have the same duties toward children born outside of wedlock as toward children born within it." Constitution art. 42 (Pan American Union, *Constitution of the Republic of Uruguay 1967* (1967)).

### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be reversed.

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Indigent*

December, 1967

In the  
Supreme Court of the United States

OCTOBER TERM, 1967

THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY AND AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A.B.C. INSURANCE COMPANIES.

Appeal from the Supreme Court of Louisiana.

BRIEF OF ATTORNEY GENERAL  
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In the  
Supreme Court of the United States

OCTOBER TERM, 1967

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THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY AND AUSTIN LEVY,

v.

THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A.B.C. INSURANCE COMPANIES.

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Appeal from the Supreme Court of Louisiana.

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BRIEF OF ATTORNEY GENERAL  
STATE OF LOUISIANA.

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I.

INTEREST OF ATTORNEY GENERAL  
OF LOUISIANA

The State of Louisiana is not a party to this suit. (App. pp. 51-54; Appellant's brief p. 5, note 1). The interest of the Attorney General of Louisiana arises from the fact that the constitutionality of Article 2315 of the Louisiana Civil Code has been attacked by Appellants. Louisiana Code of Civil Procedure, Article 1880.

## II.

**ARGUMENT**

*May it please the Court:*

The sole question before this Court is whether the Fourteenth Amendment, in prohibiting a state from denying any person "the equal protection of the laws," has barred Louisiana from formulating her domestic policy as she has in an area concededly within the regulatory power of the State.<sup>1</sup>

Appellants<sup>2</sup> and Amicus Curiae<sup>3</sup> have proposed

<sup>1</sup>The case at bar is not a "due process" case at all. *The rights of illegitimates cannot be said to stem from the traditional concept of due process.* This Court has said so often, so as to constitute it a truism, that the Constitution must be interpreted in the light of the common law as it existed at the time of the adoption of the Constitution. *Den ex dem. Murray v. Hoboken Land and Improvement Company*, 18 Howard 272; *Lowe v. Kansas*, 163 U. S. 81. The liberty guaranteed by the Fourteenth Amendment's due process clause has been defined by this Court as the enjoyment of "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390. The common law in 1787, the time of the adoption of the concept of due process in the Bill of Rights considered the illegitimate child as *nullius filius*, or "nobody's child", not even the mother's, and entitled to no rights from any relation. Speiser, *Recovery for Wrongful Death* (the Lawyers' Co-operative Publishing Company, 1965) p. 587. Therefore due process rights at the time of the adoption of the due process concept in the Bill of Rights (which is equivalent to the due process concept of the Fourteenth Amendment) did not include any rights for illegitimate children stemming from filiation.

<sup>2</sup>Appellants' brief pp. 18-23

<sup>3</sup>Brief of NAACP Legal Defense and Education Fund, Inc. and the National Office for the Rights of the Indigent, pp 11, 13, 21-25.

that every illegitimate child should have all of the same rights, including inheritance rights, as children born in wedlock. Their basic argument herein is that the State cannot constitutionally make any difference in the rights of legitimates and illegitimates. Amicus<sup>4</sup> has even gone so far as to question the social usefulness of marriage and the legitimate family.

Undoubtedly appellants and amicus are unaware that this has been the classic approach of totalitarian regimes in their effort to destroy the family as the basic social institution.

Through the original Family Code of 1918, illegitimacy was eliminated by fiat in Bolshevik Russia. It was decreed that there should be no legal or social distinction between a child born in or out of wedlock. This decree was designed as part of the Bolshevik attack on the family. The Bolsheviks regarded the family as an enemy of the state because it claimed the loyalty of its members in preference to the state. Marriage was discouraged and free love advocated as an expression of contempt for the Western "petty bourgeois" restrictiveness on sex. As a result, the family in Bolshevik Russia became much less important in rearing the child, and the state became the institution which formed the minds of Soviet youth<sup>5</sup>. Kenkel, *The Family in Perspective* (Meredith

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<sup>4</sup>Id. p. 13

<sup>5</sup>That such a practice is foreign to our system of government was recognized by this Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) : "The fundamental theory of liberty upon which all governments in this Union repose excludes any gen-

Publishing Co. 2d ed. 1966), pp. 118, 120; Nimkoff, Comparative Family Systems (Houghton Mifflin 1965) p. 55; Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 607-608, 638-639; Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) pp. 245-246.

In Nazi Germany, illegitimacy was encouraged because the state was anxious for more births. Illegitimate mothers were considered of greater value to the nation than the childless married woman. Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 607-608.

Communist China's program in the early 1950's aimed at breaking up traditional family relationships backfired and led to increased juvenile delinquency, multiple sexual relationships and the complete instability of society. Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) p. 245.

Louisiana's purposes in granting greater rights to legitimates than to illegitimates are not the punishment of illegitimates and not even the discrimination against immorality in sexual behavior. Louisiana's purposes in this area are positive ones; the *encouragement* of marriage as one of the most important institutions known to law, the preservation of the legitimate family as the preferred environment for socializing the

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eral power of the State to standardize its children . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the duty, to recognize and prepare him for additional obligations."

child, and the preservation of the security and certainty of property rights linked with family status.

Christian Roselius, in his lectures on the civil law of Louisiana, delivered at the Tulane Law School in 1871, described the civil law attitude toward marriage as follows:

"Marriage is in every sense the most important institution known to the law. It is indeed the very cornerstone of the social fabric . . ."

See Franklin, *The Institutes of Christian Roselius*, 38 Tulane Law Review 279, 305 (1964).<sup>6</sup>

The State of Louisiana, consistent with civil law tradition, links property rights with family status based on marriage. This reflects the state's concern for the preservation and encouragement of marriage as the preferred social institution for civilizing its children.

The stable family socializes the child and invests him with the values required in Western civilization.<sup>7</sup> Marriage provides the preferred method of assuring the stable family. Marriage has been found to be an extremely useful social requirement for the preserva-

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<sup>6</sup>This Honorable Court has very recently agreed with Roselius' assessment of the importance of marriage in *Loving v. Commonwealth of Virginia*, 87 S. Ct. 1817, 1824 (1967) as follows: "Marriage is one of the 'basic civil rights of man' fundamental to our very existence and survival." (Emphasis ours)

<sup>7</sup>"A democratic society rests, for its continuance, upon the healthy, well rounded growth of young people into full maturity as citizens, with all that implies". *Prince v. Massachusetts*, 321 U.S. 158 (1944).

tion of the family and stabilizing the primary group in which children are reared. Baber, Marriage and the Family (McGraw Hill 2d ed 1953) pp. 680-683; Delliquadri, Helping the Family in Urban Society (Columbia University Press 1963) p. 177; Duvall, Family Development (Lippincott 2d ed 1962) pp. 48-49.

Marriage has been encouraged through the traditional distinction between legitimate and illegitimate relations which exists in the United States.

The marriage rate in the United States is higher than any other Western country and most other countries in the world. Nimkoff, Comparative Family Systems (Houghton Mifflin 1965) p. 331. The 1962 Statistical Abstract of the United States shows that increasingly more people are getting married than in the past and that the average bride and groom is younger today than in the past. Moreover, *the proportion of marriages to avoid illegitimacy of offspring is increasing*. See Boalt, Family and Marriage (Social Science Series, McKay & Co. 1965) pp. 65-66; Kenkel, The Family in Perspective (Meredith Publishing Co. 2d ed 1966) pp. 220-222; Farber, Family Organization and Interaction (Chandler Publishing Co. 1964) pp. 113-114, 129-130.

The eminent sociologist, H. T. Christensen, advances the theory that the more restrictive a culture is in sexual matters, the more infrequent will be the occurrence of premarital pregnancy, and that when

it does occur, the more certainly the restrictive culture will lead the couple to marriage in order to prevent the child from being illegitimate. Boalt, agreeing with Christensen's theory, points out that Utah, with a very restrictive sexual culture, has a low percentage of illegitimate children, but Denmark, with a very permissive sexual culture, has a high percentage of illegitimate children. Boalt, *Family and Marriage* (Social Science Series McKay & Co. 1965) pp. 83-84. Boalt further points out that while marriage is increasing, the reason for increased illegitimacy is not the failure of the marriage laws, but the fact that society now does more to help unmarried mothers. Boalt, op. cit. supra at p. 89. Moreover, Sirjamaki, in his study of *The American Family* (Cambridge University Press 1953) p. 150, points out that illegitimate daughters tend to err in the manner of their illegitimate mothers, producing more illegitimate children.

Dr. Goode's study of *The Family* (Foundations of Modern Sociology Series, Prentice Hall 1964) p. 30, points out that it is the *community* which maintains conformity to the norm of legitimacy, by giving or withholding prestige and honor. If the community grants almost as much respect for non-marriage as for marriage, illegitimacy increases.

Since marriage as an institution is fundamental to our existence as a free nation, it is the duty of the State of Louisiana to encourage it. One method of encouraging marriage is granting greater rights to legitimate offspring than those born of extra-marital

unions.<sup>8</sup> Superior rights of legitimate offspring are inducements or incentives to parties to contract marriage, which is preferred by Louisiana as the setting for producing offspring.

Tradition supports the power of Louisiana, rather than the federal government, to regulate the institution of marriage within the state's borders and to prescribe all the effects of marriage, including status of offspring and property rights derived from marriage.

Recognition of marriage as a civil contract in English Common law was transferred to the American colonies where it provided the legal structure of the American family. The acceptance of marriage as a contract carried with it the power of the colonial legislatures to determine the obligations and rights of marriage. The state was considered a third party to every marriage ceremony, representing the public interest by imposing its legal and ethical standards upon an otherwise private undertaking. After the adoption of the federal constitution, this pattern was continued with each state being given sole jurisdiction over marriage and family. Sirjamaki, *The American Family* (Cambridge University Press 1953) pp. 32-33;

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<sup>8</sup>The recognition of the right to transmit property after death as an incentive for human behavior is recognized. "The founding fathers believed, and we continue to believe, that the ability to own property *and to transmit it to our families*, gives each of us an incentive to produce to the utmost of our abilities." (Emphasis supplied). Leach, *Property Law*, as quoted in *Talks on American Law* (Berman Ed. Vintage Books 1961) p. 165.

See *In re Soeder's Estate*, 220 N.E. 2d 547, 7 Ohio App. 2d 271 (1966); *Marquez v. Aviles*, 252 F. 2d 715, cert. den. 78 S. Ct. 917.

The historical or traditional jurisdiction of the States over marriage and family has a solid foundation in reason.

Deviation in sexual behavior is costly to society. Illegitimacy, a by-product of sexual deviation, constitutes one of society's dilemmas; the welfare of the illegitimate balanced against the desire of society to promote marriage as the preferable status for producing offspring. Louisiana has balanced her scales well.<sup>9</sup> Louisiana does not wish to endanger the stability of marriage and family by abolishing distinctions between legitimates and illegitimate. At the same time, Louisiana has eased the burden on illegitimate by her very liberal provisions for illegitimate. A fair balance has been struck between the needs of society and the welfare of the illegitimate, and the fourteenth Amendment requires no more of the State.

As Mr. Justice Holmes so aptly put it, "As to the violation of equal rights which is charged, it may be

<sup>9</sup> The wrongful death provision of Article 2315 of Louisiana's Civil Code cannot be considered in isolation, but must be considered as part of a total scheme for balancing the interests of society for stable marriages against the welfare of the illegitimate. Article 17 of Louisiana's Civil Code requires that laws in *pari materia* (same subject matter) must be construed with reference to each other. As pointed out in greater detail in Appellee Insurance Company's brief, pp. 21, 29-32, Louisiana has evolved an elaborate statutory scheme for encouraging and preserving legitimate familial relationships, while at the same time providing protection for illegitimate. )

replied that the dogma of equality makes an equation between individuals only, *not between an individual and the community*. *No society has ever admitted that it could not sacrifice individual welfare to its own existence*. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to their death. It runs highways and railroads through old family places in spite of the owner's protest, paying in this instance the market value, to be sure, because no civilized government sacrifices the citizen more than it can help, *but still sacrificing his will and his welfare to that of the rest*." (Emphasis ours). Oliver Wendell Holmes, The Common Law, Lecture II, as quoted in Lerner, The Mind and Faith of Justice Holmes (Modern Library 1954) p. 58.

And again, in *Buck v. Bell*, 274 U.S. 200, Mr. Justice Holmes, elaborating on the theme of balancing the interest of the individual against that of the welfare of society, stated:

"We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence."

Regarding classification under the equal protection clause, Mr. Justice Holmes in *Dominion Hotel v. Arizona*, 249 U.S. 265, 268 (1919) stated the following:

"The only question is whether we can say on our

judicial knowledge that the legislature of Arizona could not have had any reasonable ground for believing that there were such public considerations for the distinction made by the present law . . . If in its theory, the distinction is justifiable, as for all that we know it is, the fact that some cases, including the plaintiff's are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines."

Louisiana's Legislature has evidenced its belief in a policy of protecting marriage through the grant of preferred rights to legitimate relations. To paraphrase this Court's language in *Goesaert v. Cleary*, 335 U.S. 464 (1948), "This Court is certainly not in a position to gainsay such belief by the Louisiana Legislature."

### III. CONCLUSION

In view of the foregoing, the appeal herein should be dismissed, or in the alternative, the judgment below affirmed.

Respectfully submitted,

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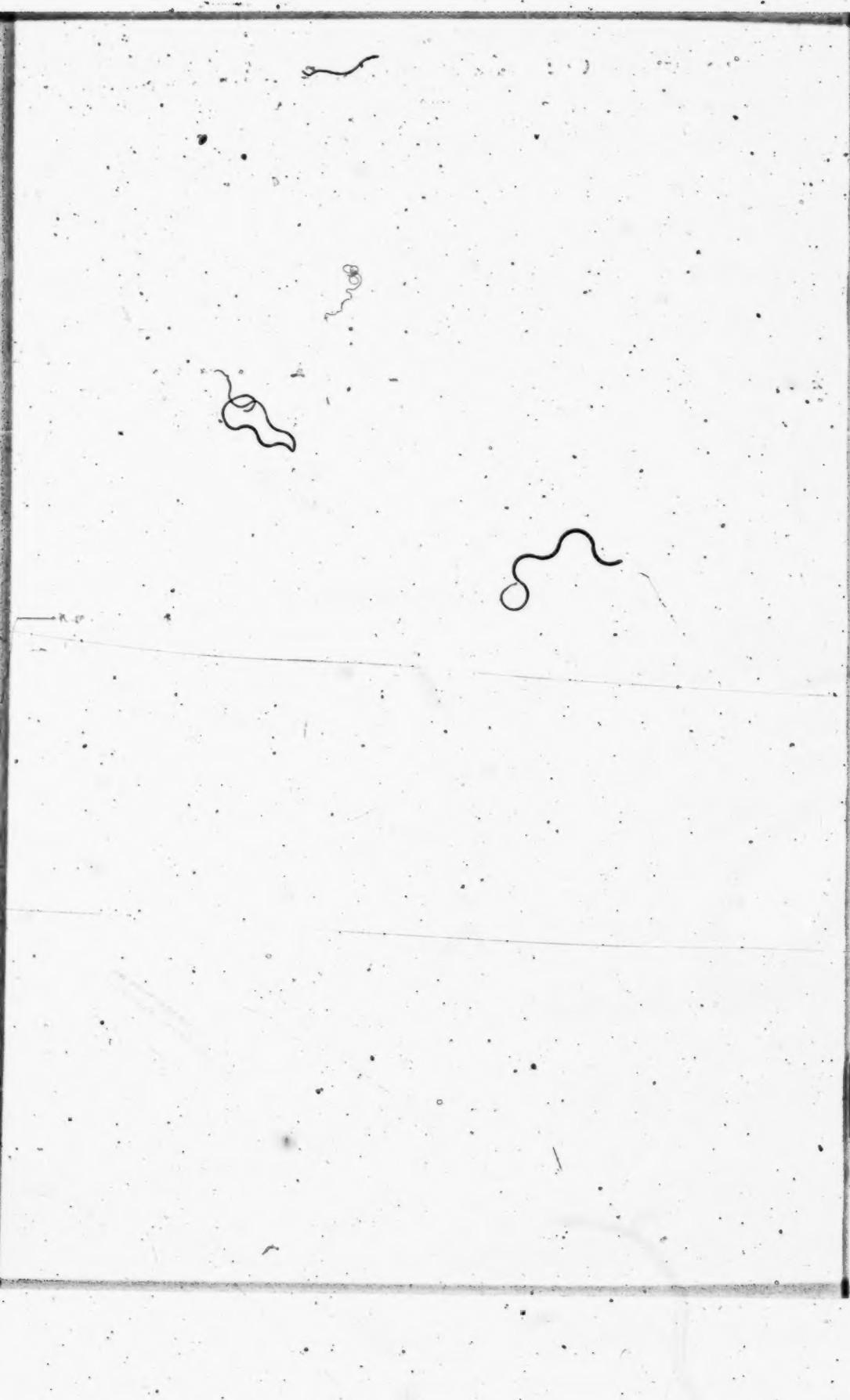
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New Orleans, La., this \_\_\_\_ day of January, 1968.

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JUN 14 1968

JOHN F. DAVIS, CLERK

# Supreme Court of the United States

OCTOBER TERM, 1967

No. 508

**THELMA LEVY**, in her capacity as Administratrix of the succession of **LOUISE LEVY** and as tutrix of and on behalf of the minor children of **LOUISE LEVY**, said children being: **RONALD BELL**, **REGINA LEVY**, **CECILIA LEVY**, **LINDA LEVY** and **AUSTIN LEVY**,

versus

**THE STATE OF LOUISIANA** through the **CHARITY HOSPITAL OF LOUISIANA** at **NEW ORLEANS** **BOARD OF ADMINISTRATORS** and **W. J. WING, M.D.**, and **A. B. C. INSURANCE COMPANIES**.

**BRIEF ON BEHALF OF APPELLEE FOR REHEARING BEFORE THE SUPREME COURT OF THE UNITED STATES.**

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SUPREME COURT OF THE UNITED STATES

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THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,

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BRIEF ON BEHALF OF APPELLEE FOR REHEARING BEFORE THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF THE CASE.

ARGUMENT.

Appellant brought this action under Louisiana Civil Code Article 2315 alleging that she was tutrix of the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appellant only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth

Circuit, affirmed the judgment of the lower court and denied appellant a right or cause of action under Article 2315 because of illegitimacy of the minor children. Appellant then sought review in the Supreme Court of Louisiana and was denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was taken and relief was granted to appellant.

**I. THE COURT HAS FUNDAMENTALLY ALTERED THE INTERPRETATIVE GUIDELINES OF THE EQUAL PROTECTION OF THE LAWS CLAUSE BY MAKING THE TEST OF CONSTITUTIONALITY RATIONALLY IN THE MIND OF THE COURT.**

Traditionally, the Court has approached State legislation challenge on equal protection of the laws grounds from two points of view. Those statutes which make classifications based upon racial grounds are manifestly unconstitutional, patently invidious and can only be sustained by some overriding purpose. *Loving vs. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 817 (1967); *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964). The other approach to equal protection of the laws cases starts with a presupposition that a State law is presumably constitutional and must be shown to be intentionally and purposely discriminatory, arbitrary and without reason. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957); *McGowan vs. State of Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393 (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2d Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs.*

*Ryder*, 176 F.Supp. 90 (W.D. La., 1959); *W.M.C.A. vs. Simon*, 208 F. Supp. 368 (S.D.N.Y., 1962). Intentional or purposeful discrimination is not presumed. Unreasonableness is not presumed. *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). Merely because the Court entertains a different set of social beliefs, it will not substitute its judgment for that of a State Legislature. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963).

The decision of the Court in the instant case departs from the traditional concepts of equal protection of the laws and substitutes a new test, that of rationality in the mind of the Court. The Court declares that regardless of the test used in establishing a classification, the end result "is whether the line drawn is a rational one." According to the Court, its assessment of rationality will be the test of whether or not a non-racial classification is invidious. The instant decision fails to adhere to the traditional test of whether a State statute is arbitrary, intentionally and purposefully discriminatory and without any justifiable reason. The Court has failed in this case to presume rationally on the part of a State Legislature and has rather substituted its own assessment of what is rational and proper. Thus, the Court has pruned from the usual equal protection of the laws test the requirement that a State statute, in order to run afoul of the constitution, be shown to be intentionally and purposefully discriminatory and entirely unreasonable. The Court has abandoned the presumption that such statutes are reasonable and non-discriminatory.

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Using the simple test of rationality, whatever a majority of the Court decides is rational will prevail over whatever the majority of the members of the State Legislature conclude is rational. Thus, the instant case departs from the traditional equal protection of the laws thinking and extends that clause into a veritable overriding veto passing upon the wisdom of the State Legislature.

## **II. THE RIGHT TO SUE FOR WRONGFUL DEATH IS NOT A FUNDAMENTAL CIVIL RIGHT; ALL THAT IS INVOLVED IS A PROPERTY RIGHT.**

This is a case which concerns only the right to sue for wrongful death. It does not concern the right to vote. It does not concern racial discrimination in public education nor does it concern freedom of speech, press or assembly. The right to sue is not one of those inalienable rights of men.

The action for wrongful death did not exist at Common Law or at Civil Law. *Panama R. Co. vs. Rock*, 266 U.S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). The right of action for wrongful death had to await statutory development in the 19th and 20th centuries. Article 2315 by its very terms declares the right to recover damages as being a property right. "A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survives, is inherited by his legal instituted or irregular heirs, whether suit has been instituted thereon by the sur-

vivor or not." The Court in its opinion declares that the rights involved concern the intimate familial relationship between child and mother. How that relationship is fostered, denied or destroyed by whether or not an action for wrongful death lies is not conceivable. A familial relationship by its very nature has nothing to do with the action for wrongful death.

All of those States of the Union which do not permit illegitimate children to sue nevertheless permit the members of a family who are illegitimate to enjoy the full family relationship. Indeed, that was the case with regard to the Levy children according to the pleadings. Illegitimate children are not taken from their mother, they are not separated or placed in orphanages nor are they precluded from any of the other civil rights that humans enjoy. Their status, however, precludes them from having certain property rights and these arise solely from the fact that they are not legitimate members of a family and therefore do not have rights in the property of the family. They may marry, may own land or hold offices.

It is indeed anomalous to hold that a fundamental and intimate family relationship is dependent upon whether or not a party has an action for the wrongful death for the member of a family.

### III. BY PERMITTING ILLEGITIMATES TO SUE, THE COURT HAS INTRODUCED A NEW ARBITRARINESS, UNREASONABLENESS AND ARTIFICIALITY INTO THE LAW OF WRONGFUL DEATH WHICH WILL ULTIMATELY RESULT IN CREATING THE BASIC UNFAIRNESS THE COURT FEELS IT IS AVOIDING.

According to the Civil Code, law is an expression of legislative will and "it orders and permits and forbids, it announces rewards and punishments, its provisions generally relate not to solitary or singular cases, but to what passes in the ordinary course of affairs." Art. 2. The law relating to the action for wrongful death must be viewed not in terms of solitary or singular cases, but rather in terms of ordinary course of affairs. While it is true that the Levy children, according to the pleadings, were indeed close to their mother, the general social history reveals that illegitimate have generally tended to be less close to their families than legitimate.

Under the thinking of the Court, an illegitimate child who had no association with his father or mother ever might enjoy the action for wrongful death and preclude an action on the part of a parent who was close and intimate with the deceased. By same token, a common law wife could preclude a loving mother or father from suing.

Undoubtedly, the Legislature in drafting Articles 2315 and 3556 of the Civil Code, faced important problems as to who might be accorded the action for

wrongful death. Ideally speaking, it would have been wonderful to have accorded an action to all persons who suffer personal loss upon the death of another. But, as a matter of practical consideration, the administration of law would have been chaotic indeed where this would have been allowed. The Legislature in recognizing the generality of affairs, selected certain classes of persons who would have status to sue and arrange them in a hierarchy. First in the hierarchy are the surviving spouse and child or children. In the normal course of affairs, these are the persons who are closest to the deceased. Following the surviving spouse and children, the Legislature next gave the action to the surviving father and mother. The father and mother are undoubtedly next most interested and closest to the decedent. Following them, the brothers and sisters of the decedent may sue. Undoubtedly, the Legislature recognize that in the generality of events, legitimate relations are stronger and firmer than illegitimate ones. In permitting illegitimate children to sue, the Court will undoubtedly preclude surviving parents who have been close to a decedent from suing.

Indeed, the decision of the Court will mean that tortfeasors go free. If a tortfeasor were to show that the decedent left an illegitimate child and no one knew where that illegitimate might be found, only that illegitimate or his heirs would have the cause of action and the parents who had nurtured and cared for and loved the decedent would be precluded from suit. Thus, in the name of equal protection of the laws, the tortfeasor would go free on the basis of the decision.

in the instant case. The mere existence of an illegitimate child somewhere or the existence of heirs of that illegitimate child somewhere would result in there being no possible action on the part of the surviving parents. *Trahan vs. Southern Pacific Co.*, 209 F.Supp. 334 (W.D. La. 1962); *Horrell, et al. vs. Gulf & Valley Cotton Oil Co.*, 15 La. App. 603, 131 So. 709 (1930); *Smith vs. Monroe Grocery Co.*, 171 So. 167 (La. App. 1936).

**IV. THE COURT ERRS IN ASSUMING THAT THE LOUISIANA LEGISLATURE CREATED A CLASS OF LEGAL NON-PERSONS, DENIED FUNDAMENTAL FAMILIAL RELATIONSHIPS AND GRANTED FREEDOM TO THE TORT FEASOR ON ACCOUNT OF THE ILLEGITIMACY OF THE CHILDREN.**

Louisiana has made legal non-persons out of no one. Illegitimate children may marry, bear children, be raised by parents, bring legal actions, inherit, own land, hold office, attend schools, enjoy public amusements, engage in all occupations and are free to develop themselves to their fullest capacities. They may form corporations and those corporations are wholly and purely legal. To say that persons who may engage in all of these activities are legal non-persons and cannot enjoy and indulge in fundamental familial relationship is to disregard fact. By contrast, Louisiana has taken the view that the illegitimate is to be brought in to the fullest of rights wherever feasible. The illegitimate child can be legitimated with ease. All that is necessary is an acknowledgement before a Notary and two witnesses. Louisiana Civil Code Ar-

ticle 200, Louisiana Revised Statutes 9:391. According to Article 917, et seq., natural or illegitimate children have certain rights of inheritance. Pursuant to these articles, the law has seen to it that they have an alimony. Under the Workmen's Compensation Statute, they may have a right of recovery for the death of a supporting parent. La. Rev. Stat. Ann. §§ 23:1231, 1252, 1253; *Thompson vs. Vestal Lbr. & Mfg. Co.*, 208 La. 83, 119, 22 So.2d 842 (1945). Louisiana has evinced a concern for the illegitimate rather than treating him as a legal non-person devoid of possible family relationships.

The argument that the tort feasor is permitted to go free is similarly lacking in merit. In the Levy case, a legitimate mother claims the right to sue for the wrongful death of Louise Levy. Her action would have been entirely good had she filed it within the one year allowed by law. Indeed, assuming that the mother had timely filed this action, the Court would have had to decide an entirely different issue. The Court would have had to have determined whether the State of Louisiana might confer the right to sue upon a legitimate mother as opposed to illegitimate children. No alleged tort feasor would have gone free had Louise Levy not slept on her legal rights. Certainly the alleged tort feasor cannot be held responsible for the failure of the claimant to assert her rights timely. Hence, the argument that a tort feasor goes free has no legal basis in the Levy case.

Under the plain provisions of Article 2315, the mother of Louise Levy was possessed of the action.

## V. THE COURT HAS NOT TAKEN INTO ACCOUNT THE RATIONAL JUSTIFICATION FOR THE REQUIREMENT OF LEGITIMACY IN WRONGFUL DEATH ACTIONS.

The Court has assumed that the requirement of legitimacy is somehow aimed at curbing "sin" or solely at discouraging the bringing of children into the world out of wedlock. The Court has seized upon this as the only possible justification for the requirement of legitimacy. The Court overlooks the entire basic presuppositions which underlies Louisiana's Civil Law.

In sharp contrast to the Common Law, the Napoleonic Civil Law looks to the preservation of the family as one of the ends of law. To that end, rights in family confer rights in property. A person's legal heirs cannot be disinherited by will. Louisiana is not a State where free testation is allowed. One cannot fail to leave to one's descendants a certain portion of one's property. Louisiana Civil Code Articles 1493-1495. The Legislature further in defining the class of those who might sue for wrongful death confer the action on those whom it thought would be closest to the deceased. It took care of the surviving spouse and legitimate children who were undoubtedly the immediate family of the deceased. It took account of the fact that in all likelihood illegitimate relations were not part of the close family circle. It next conferred rights upon the next more immediate relations, the parents of the deceased. The thinking of

the Court undoes the thinking of the Legislature. The Court seems to have ignored the fact that the classifications chosen are presumably reasonable, non-discriminatory and non-arbitrary. *Snowden vs. Hughes, supra.* The Court has failed to heed its own statement, "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan vs. State of Maryland*, 366 U.S. 420 at 427. Even Louisiana's unique historical legal situation, the judgment of the Legislature that these classifications were doubtlessly by the most normal and correct and those who would suffer most by the death of the decedent, and it is obvious that a rational basis of a classification adopted by Louisiana exists.

The Legislature of Louisiana could have said that friends have an action for wrongful death of another friend, employees have an action for the death of their employers, or any of a host of other beneficiaries, but the Legislature chose those it felt in the general run of affairs would be the most likely to suffer loss because of a wrongful death. The fact that inequality may result is of no consequence. "State Legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality." *McGowan vs. State of Maryland*, 366 U.S. 420 at 427.

The Court in its Glona opinion alludes to the fact that the problem of fraudulent claims should be one of burden of proof. Louisiana saw fit to avoid the

problems inherent in such a context by requiring that formalities as to status be observed. Indeed, the State is wise in requiring formalities. There are innumerable instances in the law where in order for a given legal consequence to occur, formalities must be complied with. Marriage, adoption of children, purchase and sale of immovables and any of a host of other matters require that formalities be complied with before legal effect may be granted. Certainly, to require legitimacy where legitimacy so easily obtains in Louisiana is not imposing an undue and discriminatory burden. In matters of family and property law, Louisiana has clearly stated that a legal status must exist or rights will not flow. Louisiana has thereby avoided all of the inherent uncertainties and problems connected with a context to prove correct status by burden of proof and balancing evidence and counter evidence.

The Court has not gone forward and sought justification for the wrongful death statute.

The judgment of history which for so many years has set limitations on the rights of illegitimate to inherit or to sue for wrongful death requires that the Court give further consideration to the rational presuppositions for the requirement of legitimacy. Certainly the creators of Lord Campbell's Act and its progeny and all of the legislators and judges who heretofore have passed upon these requirements cannot be declared to have been lacking in rationality. The fact that today, some States are relaxing these

laws while others have not is ample proof of the fact that in the minds of many, there exists the reasons for the rendition of these laws. The fact that in some of our States, the action for wrongful death is allowed only in the event of the death of the mother, but not on the father, is further proof that in the judgment of these legislators, the rational basis exists for withholding the actions in the case of the death of a father. TCA 20-607; *Dilworth vs. Tisdale Transfer and Storage Co.*, 354 S.W.2d 261 (Tenn. 1962); Georgia Code 74-204; Maryland Code Art. 67 sec. 4. *State for Use of Holt vs. Try, Inc.*, 152 A.2d 126 (Md. App. 1959); South Carolina Code 10: 1953. *Smith vs. Atlantic Coast Line R. Co.*, 212 S.C. 332, 47 S.E.2d 725 (1948); Vernon's Ann. Tex. Civ. St. Arts. 4671, 4675. *Jones vs. S.S. Jessie Lykes*, 253 F.Supp. 368 (E.D. Tex., 1966); *Deathrude vs. Fort Worth and D.C.R. Co.*, 154 S.W.2d 918; *Gross vs. Franz*, 287 S.W.2d 289; *H. & S. A. Ry. Co. vs. Walker*, 106 S.W. 705; *DeMedio vs. Fort Norris Express Co.*, 71 N.J. Super. 190, 176 A.2d 550 (1961); *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); N.Y. Estates, Powers, and Trusts Law sec. 4-1.1 (1) (1967); *Evans v. United States*, 100 F.Supp. 5, (W.D. La. 1951); Louisiana Civil Code Articles 178-245. Under the Federal Employers Liability Act, an illegitimate may not have a cause of action depending upon State law. *Hammond vs. Pennsylvania R. Co.*, 54 N.J. Super. 149, 149 A.2d 515, rev'd on other grounds 31 N.J. 244, 156 A.2d 689.

With the law in such a state of flux, it cannot be presumed that Louisiana's Legislature has acted irrationally.

## **VI. THE COURT'S DECISION WILL UNDERMINE AND PLACE IN JEOPARDY RIGHTS IN PROPERTY IN LOUISIANA AND IN MANY OTHER STATES.**

The opinion of the Court is of such breadth that its thinking can be utilized to declare unconstitutional all of the laws of the various States precluding or limiting the action for wrongful death and descent and distribution in the United States. The thinking of the Court means that the laws of the various States governing inheritance by illegitimates have run afoul of the constitution.

Any illegitimate child henceforth may claim that he or she is being denied fundamental intimate relations because of the failure of the State to accord to a legitimate a right of inheritance. The very same thinking which the Court has employed to confer upon an illegitimate a property right to sue for wrongful death can likewise confer a property right in inheritance.

The potential retroactive application of the decision in the instant case renders title to real property as well as personal property vulnerable. Nowhere is this more true than in Louisiana where the institution of a forced heirship prevails.

Louisiana's status as a member of the family confers rights in property. Louisiana does not have free testacy. The testament, therefore, may only dispose of a certain portion of his property. The remainder must go to those who are classed as forced heirs which means principally the descendant of a person. Civil Code Articles 1493-1495.

Where in Louisiana intestacy exists, property is again distributed amongst the legal heirs who naturally include the children but exclude illegitimate children. Civil Code Articles 887, et seq.

Because of the breadth of the thinking of the Court in the instant case, the lingering possibility of an illegitimate existing or of an illegitimate through whom a title might be attacked is a real issue. Because of forced heirship, it is necessary that title examiners examine all succession proceedings and satisfy themselves as to the proper familial status of persons who appear in the chain of title. Henceforth, the possible existence of an illegitimate creates a cloud on title.

The Louisiana Legislature has been strict in its requirement that proper status exists. Where the property system of a State depends upon the legitimacy relationships, it is important that the entire security of property be properly protected. Louisiana has accomplished this by simply requiring that correct status exists. But by the breadth of the thinking of the Court in the instant case, security of property in Louisiana and in other States has been seriously undermined.

## VII. IN GRANTING A RIGHT OF ACTION TO ILLEGITIMATES, THE COURT HAS FAILED TO UNDERTAKE A PROPER BALANCING OF INTERESTS.

There exists a social interest in aiding the plight of illegitimate. There exists a social interest in eradicating the base stigma which attaches to illegitimacy. On the other hand, there also exists a social interest in preserving legitimate relationships, in fostering the family in preserving the security of transactions and property rights and in protecting society from uncertainty in matters of family law.

The Court has seen fit to recognize as a family right the right of illegitimate to sue for wrongful death. In so doing, it has broken allegiance to the traditional concepts of equal protection of the laws, has jeopardized the rights of legitimate relations and undermined the security of transactions and property rights in the various States. Henceforth, in those States where the party entitled to sue for wrongful death happens to be the legal heir of the decedent, then by the force of this decision, that person shall have inheritance rights likewise.

It should be noted further that the Court has and should recognize a legitimate interest in preserving the basic tenets of federalism. By the decision in the instant case, the Court has undertaken an incursion into areas preserved to the States. Henceforth, all State law relating to family matters and setting up classifications between persons must pass the test of

rationality in accordance with the thinking of the Court.

Louisiana has attempted to balance the interests of the illegitimate with the competing interests of the other members of the family and of the society in general. She has accorded the illegitimates certain rights and made for them a rather simple process to obtain proper status. Yet the Court declared that Louisiana's balancing of the social interest has been irrational and the Court has substituted its own. Louisiana has struck a balance of the competing social interest which is in no way discriminatory, unreasonable or arbitrary. Yet the Court entertains other views concerning these important matters. *Ferguson vs. Skrupa, supra.* It is certainly unfortunate that in the name of conferring property right upon illegitimates, the entire social interest in the security of property and the rights of family shall confer property rights in a State such as Louisiana should suddenly be imperilled.

#### **VIII. THE COURT ERRS IN ACTING AND SITTING AS A SUPER LEGISLATURE FOR THE FIFTY STATES IN MATTERS OF HISTORIC CONCERN TO THE STATES ONLY AND HAS THEREBY IMPINGED ON THOSE RIGHTS CONSTITUTIONALLY RESERVED TO THE STATES.**

Every case brought pursuant to the Fourteenth Amendment involves delicate issues of the relationship between the States and the national government. Historically, the action for wrongful death has been

one of those matters committed to the wisdom of the State Legislatures. Laws relating to the family generally have been left to the States. Yet, with the instant decision, the groundwork has been laid for judicial legislation in these vital areas of personal concern. None can say but that the Court has acted as a super legislature. By declaring a law unconstitutional, it has legislated. It has legislated for Louisiana and the other States. It has imperilled a system of property rights unique to Louisiana. This is done and accomplished in the name of the Fourteenth Amendment. The Court has legislated in an area of historic State concern only. The Court has violated its own limitations as set forth in *Snowden vs. Hughes, supra*, wherein it was held that the Fourteenth Amendment and the Civil Rights Act were not to become vehicles whereby the national government might undertake to govern matters of historical exclusive State cognizance. The Tenth Amendment has indeed become meaningless when State wrongful death statutes have become the concern of the national government. The Fourteenth Amendment and the Civil Rights Act were never intended to become the vehicles whereby the social acceptability of the family law of the various States was to be subjected to national scrutiny. In the name of equal protection of the laws, common law wives will claim the same rights as legitimates and persons who for any form or defect in status will clamor that their constitutional rights have been abridged. These matters will henceforth cease to be a proper matter for exclusive State competence.

**CONCLUSION.**

For the reasons stated above, a rehearing should be granted and the judgment below affirmed.

Respectfully submitted,

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**CERTIFICATE.**

I HEREBY CERTIFY to the effect that this Petition for Rehearing is presented in good faith and not for delay, and I also certify that this Petition for Rehearing is restricted to the grounds above specified.

WILLIAM A. PORTEOUS, JR.

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**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of ....., 1968.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this .... day of ....., 1968.

WILLIAM A. PORTEOUS, JR.



# SUPREME COURT OF THE UNITED STATES

No. 508.—OCTOBER TERM, 1967.

Thelma Levy, etc., Appellant, | On Appeal From the  
v. | Supreme Court of  
Louisiana, etc., et al. | Louisiana.

[May 20, 1968.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant sued on behalf of five illegitimate children to recover, under a Louisiana statute<sup>1</sup> (La. Civ. Code Art. 2315) for two kinds of damages as a result of the wrongful death of their mother: (1) the damages to them for the loss of their mother; and (2) those based

<sup>1</sup> "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

on the survival of a cause of action which the mother had at the time of her death for pain and suffering. Appellees<sup>2</sup> are the doctor who treated her and the insurance company.

We assume in the present state of the pleadings that the mother, Louise Levy, gave birth to these five illegitimate children and that they lived with her; that she treated them as a parent would treat any other child; that she worked as a domestic servant to support them, taking them to church every Sunday and enrolling them, at her own expense, in a parochial school. The Louisiana District Court dismissed the suit. The Court of Appeal affirmed, holding that "child" in Article 2315 means "legitimate child," the denial to illegitimate children of "the right to recover" being "based on morals and general welfare because it discourages bringing children into the world out of wedlock." 192 So. 2d 193, 195. The Supreme Court of Louisiana denied certiorari. 250 La. 25, 193 So. 2d 530.

The case is here on appeal (28 U. S. C. § 1257 (2)); and we noted probable jurisdiction, 389 U. S. 508, the statute as construed having been sustained against challenge both under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

We start from the premise that illegitimate children are not "nonpersons." They are humans, live and have their being.<sup>3</sup> They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup>

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<sup>2</sup> The State of Louisiana was dismissed from the action and exceptions relating to the Charity Hospital, at which the mother was treated, were continued indefinitely. No appeal was taken with respect to either of those defendants.

<sup>3</sup> See Note, *The Rights of Illegitimates under Federal Statutes*, 76 Harv. L. Rev. 337 (1962).

<sup>4</sup> "No State" shall "deny to any person within its jurisdiction the equal protection of the laws."

While a State has broad power when it comes to making classifications (*Ferguson v. Skrupa*, 372 U. S. 726, 732), it may not draw a line which constitutes an invidious discrimination against a particular class. See *Skinner v. Oklahoma*, 316 U. S. 535, 541-542. Though the test has been variously stated, the end result is whether the line drawn is a rational one. See *Morey v. Doud*, 354 U. S. 457, 465-466.

In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489; *Morey v. Doud*, *supra*, at 465-466. Even so, would a corporation, which is a "person," for certain purposes, within the meaning of the Equal Protection Clause (*Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 188) be required to forego recovery for wrongs done its interests because its incorporators were all bastards? However that might be, we have been extremely sensitive when it comes to basic civil rights (*Skinner v. Oklahoma*, *supra*, at 541; *Harper v. Board of Elections*, 383 U. S. 663, 669-670) and have not hesitated to strike down an invidious classification even though it had history and tradition on its side. (*Brown v. Board of Education*, 347 U. S. 483; *Harper v. Board of Elections*, *supra*, at 669.) The rights asserted here involve the intimate, familial relationship between a child and his own mother. When the child's claim of damage for loss of his mother is in issue, why, in terms of "equal protection," should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?

Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother by appellees. These children, though illegitimate, were dependent on her; she cared for them and nurtured them; they were indeed hers in the biological and in the spiritual sense; in her death they suffered wrong in the sense that any dependent would.<sup>5</sup>

We conclude that it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.<sup>6</sup>

*Reversed.*

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<sup>5</sup> Under Louisiana law both parents are under a duty to support their illegitimate children. La. Civ. Code Ann. Arts. 239, 240 (West 1952).

<sup>6</sup> We can say with Shakespeare: "Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam's issue? Why brand they us With base? with baseness? bastardy? base, base?" King Lear, Act I, Scene 2.

<sup>7</sup> Under Louisiana's Workmen's Compensation Act (La. Rev. Stat. Ann. 23: 1231, 1252, 1253 (1964)) an illegitimate child, who is a dependent member of the deceased parent's family, may recover compensation for his death. See *Thompson v. Vestal Lumber & Mfg. Co.*, 208 La. 83, 22 So. 2d 842 (1945). Employers are entitled to recover from a wrongdoer workmen's compensation payments they make to the deceased's dependent illegitimate children. See *Board of Commissioners v. City of New Orleans*, 223 La. 199, 65 So. 2d 313 (1953); *Thomas v. Matthews Lbr. Co.*, 201 So. 2d 357 (La. Ct. App. 1967).

# SUPREME COURT OF THE UNITED STATES

Nos. 508 AND 639.—OCTOBER TERM, 1967.

Thelma Levy, etc., Appellant, 508	v.	On Appeal From the Supreme Court of Louisiana.
Minnie Brade Glona, Petitioner, 639	v.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Cir- cuit.
American Guarantee & Liability Insurance Company et al.		

[May 20, 1968.]

MR. JUSTICE HARLAN, whom MR. JUSTICE BLACK and MR. JUSTICE STEWART join, dissenting.

These decisions can only be classed as constitutional curiosities.

At common law, no person had a legally cognizable interest in the wrongful death of another person, and no person could inherit the personal right of another to recover for tortious injuries to his body.<sup>1</sup> By statute, Louisiana has created both rights in favor of certain classes of persons. The question in these cases is whether the way in which Louisiana has defined the classes of persons who may recover is constitutionally permissible. The Court has reached a negative answer to this question by a process that can only be described as brute force.

One important reason why recovery for wrongful death had everywhere to await statutory delineation is that the interest one person has in the life of another is inherently intractable. Rather than hear offers of proof of love and affection and economic dependence from every person who might think or claim that the bell had

<sup>1</sup> See *Van Beeck v. Sabine Towing Co.*, 300 U. S. 342, 344–345, and cases there cited.

tolled for him, the courts stayed their hands pending legislative action. Legislatures, responding to the same diffuseness of interests, generally defined classes of proper plaintiffs by highly arbitrary lines based on family relationships, excluding issues concerning the actual effect of the death on the plaintiff.<sup>2</sup>

Louisiana has followed the traditional pattern. There the actions lie in favor of the surviving spouse and children of the deceased; if any; if none, then in favor of the surviving parents of the deceased, if any; if none, then in favor of the deceased's brothers and sisters, if any; if none, then no action lies. According to this scheme, a grown man may sue for the wrongful death of parents he did not love,<sup>3</sup> even if the death relieves

<sup>2</sup> An English statute, Lord Campbell's Act, 9 & 10 Vict. c. 93 (1846), "has served as the model for similar acts in most of the states in this country." F. Tiffany, *Death By Wrongful Act* 5 (2d ed., 1913). The statute provided that the action "shall be for the benefit of the wife, husband, parent; and child . . ." It is noteworthy that English and Canadian courts held the words "child" and "parent" to exclude illegitimate relationships. *Dickinson v. Northeastern R. Co.*, 2 Hurl. & Colt 735, 33 L. J. Ex. 91, 9 L. T. (N. S.) 299; *Gibson v. Midland R. W. Co.*, 2 Ont. Rep. 658. A recent comprehensive survey of American law in the field comments that "[i]f there is a general rule today, it is probably that the word "child" or "children" when used in a statute pertaining to wrongful death beneficiaries refers to a legitimate child or legitimatoe children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." S. Speiser, *Recovery for Wrongful Death* 587 (1966).

<sup>3</sup> He may even, like Shakespeare's Edmund, have spent his life contriving treachery against his family. Supposing that the Bard had any views on the law of legitimacy, they might more easily be discerned from Edmund's character than from the words he utters in defense of the only thing he cares for, himself.

him of a great economic burden or entitles him to a large inheritance. But an employee who loses a job because of the death of his employer has no cause of action, and a minor child cared for by neighbors or relatives "as if he were their own son" does not therefore have a right to sue for their death.<sup>4</sup> Perhaps most dramatic, a surviving parent, for example, of a Louisiana deceased may sue if and only if there is no surviving spouse or child: it does not matter who loved or depended on whom, or what the economic situation of any survivor may be, or even whether the spouse or child elects to sue.<sup>5</sup> In short, the whole scheme of the Louisiana wrongful death statute, which is similar in this respect to that of most other States, makes everything the Court says about affection and nurture and dependence altogether irrelevant. The only question in any case is whether the plaintiff falls within the classes of persons to whom the State has accorded a right of action for the death of another.

<sup>4</sup> Numerous Louisiana cases, reflecting the difficulty of attempting to determine the "real" interest of one person in the death of another, have insisted upon strict conformity to the required statutory relationship, and stated that the statute may not be extended by interpretation to analogous cases. *E. g., Bradley v. Swift & Co.*, 167 La. 249. As it happens, this Court has had occasion to recognize Louisiana's interest in strict construction. See *Mobile Life Ins. Co. v. Brame*, 75 U. S. 754, holding that an insurance company, having paid the insurance after the wrongful death of its insured, had no cause of action against the tortfeasor under Louisiana law.

<sup>5</sup> See, e. g., *Burthlong v. Huber*, 4 So. 2d 480; *Doucet v. Travelers Ins. Co.*, 91 F. Supp. 864. The Court speaks in *Levy* of tortfeasors going free. However, the deceased in that case left a legitimate parent. Under the Court's opinion, the right of legitimate and perhaps dependent parents to sue will henceforth be cut off by the mere existence of an illegitimate child, though the child be a self-supporting adult, and though the child elect not to sue. Incidentally, the burden of proving the nonexistence of such a child will be on the plaintiff parent. *Trahan v. Southern Pac. Co.*, 209 F. Supp. 334.

Louisiana has chosen, as have most other States in one respect or another, to define these classes of proper plaintiffs in terms of their legal rather than their biological relation to the deceased. A man may recover for the death of his wife; whether he loved her or not, but may not recover for the death of his paramour.<sup>6</sup> A child may recover for the death of his adopted parents. An illegitimate may recover for the wrongful death of a parent who has taken a few hours to acknowledge him formally, but not for the death of a person who he claims is his parent but who has not acknowledged him.<sup>7</sup> A parent may recover for the death of an illegitimate child he has acknowledged, but not for the death of a child he may have fathered or borne but whom he did not bother to acknowledge until the possibility of tort recovery arose.

The Court today, for some reason which I am at a loss to understand, rules that the State must base its arbitrary definition of the plaintiff class on biological rather than legal relationships. Exactly how this makes the Louisiana scheme even marginally more "rational" is not clear, for neither a biological relationship nor legal acknowledgment is indicative of the love or economic

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<sup>6</sup> *Vaughan v. Dalton-Laird Lumber Co.*, 119 La. 61. At the same time, a wife may recover for the death of a man to whom she is lawfully married, although she is not dependent on him for support and, indeed, is living adulterously with someone else. *Jones v. Massachusetts Bonding & Ins. Co.*, 55 So. 2d 88.

<sup>7</sup> In *Thompson v. Vestal Lumber & Mfg. Co.*, 16 So. 2d 594, aff'd, 22 So. 2d 842, the court stated: "Children referred to in this law [the wrongful death statute] include only those who are the issue of lawful wedlock or who, being illegitimate, have been acknowledged or legitimated pursuant to methods expressly established by law." Article 203 of the Louisiana Civil Code provides that children may be acknowledged by a declaration, by either or both parents, executed in the presence of a notary public and two witnesses.

dependence that may exist between two persons. It is, frankly, preposterous to suggest that the State has made illegitimates into "nonpersons," or that, by analogy with what Louisiana has done here it might deny illegitimates constitutional rights or the benefits of doing business in corporate form.<sup>8</sup> The rights at issue here stem from the existence of a family relationship, and the State has decided only that it will not recognize the family relationship unless the formalities of marriage, or of the acknowledgment of children by the parent in question, have been complied with.

There is obvious justification for this decision. If it be conceded, as I assume it is, that the State has power to provide that people who choose to live together should go through the formalities of marriage and, in default, that people who bear children should acknowledge them, it is logical to enforce these requirements by declaring that the general class of rights that are dependent upon family relationships shall be accorded only when the formalities as well as the biology of those relationships are present. Moreover, and for many of the same reasons why a State is empowered to require formalities in the first place, a State may choose to simplify a particular proceeding by reliance on formal papers rather than a contest of proof.<sup>9</sup> That suits for wrongful death,

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<sup>8</sup> A more obvious analogy from the law of corporations than the rather far-fetched example the Court has suggested is the elementary rule that the benefits of doing business in corporate form may be denied, to the willful, the negligent, and the innocent alike, if the formalities of incorporation have not been properly complied with.

<sup>9</sup> Even where liability arises under a federal statute defining rights in terms of a family relationship to the deceased, federal courts have generally looked to the law and the formalities of the appropriate State. In *Seaboard Air Line v. Kenney*, 240 U. S. 489, arising under the Federal Employers Liability Act, 35 Stat. 65, as amended, 36 Stat. 291, this Court relied upon the North Carolina determination that the "next of kin" of an illegitimate deceased were his half

actions to determine the heirs of intestates, and the like, must as a constitutional matter deal with every claim of biological paternity or maternity on its merits is an exceedingly odd proposition.

The Equal Protection Clause states a complex and difficult principle. Certain classifications are "inherently suspect," which I take to mean that any reliance upon them in differentiating legal rights requires very strong affirmative justification. The difference between a child who has been formally acknowledged and one who has not is hardly one of these. Other classifications are impermissible because they bear no intelligible proper relation to the consequences that are made to flow from them. This does not mean that any classification this Court thinks could be better drawn is unconstitutional. But even if the power of this Court to improve on the lines that Congress and the States have drawn

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siblings rather than his father. In *De Sylva v. Ballentine*, 351 U. S. 570, arising under the Copyright Act, 61 Stat. 652, 17 U. S. C. § 1 *et seq.*, we held that the word "children" in § 24 of that federal statute should be defined by reference to California law; California law provided that an illegitimate who had been acknowledged in writing by his father could inherit from him; since the illegitimate involved in *De Sylva* had been acknowledged, we held he was included within the statutory term. Two justices, concurring in the unanimous result, argued that it was not proper to look to state law for a definition of the federal statutory term "children." Nowhere, however, was it suggested that we look to the Constitution. In *Bell v. Tug Strike*, 332 F. 2d 330, the Fourth Circuit looked to Virginia law to determine whether the plaintiff was a "widow" entitled to bring suit under the Jones Act, 46 U. S. C. § 688. Plaintiff had "married" her "husband" at a time when he was already married. Although the pre-existing marriage was later dissolved by divorce, after which plaintiff continued to live with the "husband," Virginia does not recognize common-law marriages. Consequently, plaintiff was held not to be a "widow." There was no suggestion that equal protection was in any way involved.

were very much broader than I consider it to be, I could not understand why a State which bases the right to recover for wrongful death strictly on family relationships could not demand that those relationships be formalized.

I would affirm the decisions of the state court and the Court of Appeals for the Fifth Circuit.